

No. 12,061

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TOMOYA KAWAKITA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the District Court of the United States for the
Southern District of California Central Division.
Honorable William C. Mathes, Trial Judge.

Opening Brief on Behalf of Tomoya Kawakita From
the Judgment and Sentence of Death.

MORRIS LAVINE,
620 Bartlett Building, Los Angeles 14.
Attorney for Appellant Tomoya Kawakita.

MAY 31 1950

TOPICAL INDEX.

	PAGE
Statement	1
Jurisdiction	2
Constitutional provisions, statutes and regulations involved.....	2
Summary of the facts	3
Detailed summary of facts.....	5
Specification of the assigned errors.....	35
Specification of procedural errors in the case.....	41
Summary of argument.....	44
Summary of procedural errors.....	54
Argument	58

I.

The evidence is insufficient to support the verdict. The verdict is contrary to the law and the evidence. The evidence is wholly lacking to support the general verdict or any of the special findings of the jury, either as to citizenship or as to any treasonous acts, or any of the essential elements of treason. Nor were there two direct witnesses to each overt act found by the jury..... 58

A. The burden of proof was on the Government to prove actual existing citizenship in the United States and actual duty of allegiance to the United States at the time. Two direct witnesses necessary to prove American citizenship 60

Therefore the Government failed to meet the burden of proof beyond a reasonable doubt to establish the citizenship of Kawakita as being an actual American citizen during the period covered by the indictment, to-wit, from August, 1944, to August 25, 1945, owing allegiance to the United States during this period 63

ii.

	PAGE
B. The failure of proof.....	69
The setting shows no treason.....	80
The setting	81
The citizenship of the appellant.....	92
Dual citizenship of appellant.....	94
A person holding dual nationality cannot be guilty of treason when he exercises 100% allegiance to the country of one of his nationalities wherein he is residing	98

II.

The trial court erred in failing to dismiss the indictment or enter judgment of acquittal for failure to state an offense against the laws of the United States.....	111
Kawakita's Japanese citizenship.....	115
The character of the overt acts themselves.....	128
The insufficiency of the overt acts.....	129
There were no two direct witnesses of a clear and convincing nature to the same overt acts.....	143
The overt acts and each of them are in no manner in furtherance of the crime of treason.....	151
Lack of proof of the evidence of aid and comfort.....	154
Lack of aid and comfort of the degree constituting treason.....	156
Insufficiency of the evidence of intent to betray.....	159
What is intent to betray?.....	159
The Government itself did not contend, during the trial, that the acts here charged showed treasonable intent, but they relied on independent and different evidence to show treason	165

To save repetition under the heading of errors of the trial court in the admission of evidence we also urge that the admission of all of this evidence to show "intent" was prejudicially erroneous.....	170
Defendant's state of mind.....	171

III.

A. The trial judge erred in holding that venue existed at Los Angeles, California, and that the trial court in California had jurisdiction and that he was not denied a speedy trial in Japan.....	172
B. He was also "found" in Japan within the meaning of Title 28, Section 102 (1946 Edition) and the United States District Court in Los Angeles, California, therefore had no jurisdiction.....	179
The court erred in the instructions it gave.....	180
The court gave no instructions on presumption and the effect of presumptive expatriation.....	181
The court erred in construing the Nationality Act of 1940 as the exclusive ways of losing one's nationality. The act so construed and applied is unconstitutional	184
(a) The court erred in holding that the Nationality Act of 1940 was the exclusive way in which one might expatriate one's self, or that Congress had the power to limit the natural right of expatriation.....	184
The court erred in the exclusion of evidence of the mayor of Suzuka City.....	189
Errors in instructions given.....	195
The court erred in refusing the following proposed defendant's instructions	203

The court erred in refusing certain numbered instructions of the defendant.....	205
---	-----

IV.

The trial court erred in denying the defendant the right to inspect the minutes of the Grand Jury and the right to question the foreman of the Grand Jury regarding the return of the indictment.....	211
---	-----

V.

The trial court erred in permitting fourteen jurors to sit throughout the trial of the case.....	213
--	-----

VI.

A. The verdict was illegally obtained through coercion. The verdict and judgment are therefore null and void, as violative of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.....	214
B. The court erred in the instructions given while the jury was deliberating	229
C. Separation of the jury while deliberating.....	241

VII.

During the deliberations of the jury not only were they permitted to separate without leave of court and without the knowledge of defendant or his defense counsel, but also some of the jurors became ill and a doctor was called to treat this juror without any knowledge of the defendant or his counsel at the time, and who were not informed, as a matter of fact, until after the trial had concluded.....	243
On Sunday, August 29, 1948, a doctor was called in to treat the foreman of the jury, William W. Andrews. Such doctor was present with the juror, who was seriously ill, and medicines were brought to the juror, all without the knowledge of defendant or his counsel.....	243

The jurors were kept in a room, ill-ventilated and without air conditioning, during the intense hot weather and were compelled to deliberate until exhausted. By reason of the condition of the heat, the jury rooms were open from time to time	243
Other jurors became ill and had to have medical treatment and care during the deliberation all without knowledge of the defendant or his counsel.....	243
That such procedure and proceedings denied the defendant a fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States and was coercive	243

VIII.

A. The court erred in declining to poll the jury as to the names of the two witnesses who established the constitutional requirement	254
B. The return of the jury without a unanimous verdict on the whole of the indictment as alleged was necessary unless the Government withdrew the overt acts before submission to the jury.....	256
C. The case actually resulted in a mistrial.....	257

IX.

When the trial court therefore discharged the jury without consent of the defendant and over his objections before a unanimous verdict had been reached on each of the issues was in fact an acquittal.....	258
---	-----

X.

The court erred in permitting the prosecutor to add different and new overt acts during the course of the trial in his bill of particulars. The object of the bill of particulars was to furnish the information to the defendant before trial—not after trial	259
--	-----

XI.

The court in considering punishment apparently was influenced by matters of which there was absolutely no evidence and which were argued previously on the motion for a new trial	260
---	-----

XII.

The trial judge erred in its arbitrary imposition of the sentence of death upon the appellant.....	261
Conclusion	263

INDEX TO APPENDIX

	PAGE
A.	
Article III, Section 3, Constitution of the United States of America	1
B.	
Title 18, Section 1, United States Code (1946 Edition).....	2
C.	
Title 28, Section 102, United States Code (1946 Edition).....	3
D.	
Article VI of the Constitution of the United States, Paragraph Two	2
E.	
Treaty Series No. 539—Convention Between the United States and Other Powers.....	4
Trial by Consuls in Japan.....	6
Treaties	7
F.	
United States Code Annotated, Title 8, Section 800. Right of Expatriation	10
G.	
United States Code Annotated, Title 8, Section 801. General Means of Losing United States Nationality.....	10
H.	
United States Code Annotated, Title 8, Section 802. Presumption of Expatriation.....	12
I.	
United States Code Annotated, Title 8, Section 803. Restrictions on Expatriation; Residence in United States; Age.....	13
J.	
United States Code Annotated, Title 8, Section 804. Expatriation of Naturalized Nationals by Residence Abroad.....	14
K.	
United States Code Annotated, Title 8, Section 808. Exclusiveness of Means of Losing Nationality.....	14

L.

Immigration and Nationality Regulations.....	15
--	----

M-1.

The Bulletin of the State Department Containing Information for Bearers of Passports Contains the Following Administra- tive Statement Regarding Dual Nationality.....	15
--	----

M.

Abstract of Passport Laws and Precedents.....	16
---	----

N-1.

Indictment	19
------------------	----

N-2.

The Eight Overt Acts Found by the Jury.....	22
---	----

O.

Summary of the Testimony and Page References as to Each Overt Act	26
--	----

P.

Pertinent Testimony of Tomoya Kawakita Regarding the Overt Acts	56
--	----

Q.

Testimony of Meiji Fujisawa, the Government's Witness and Interpreter	64
--	----

R.

The Following Is the Testimony of the Different Witnesses Which the Government Introduced to Show "Intent" to Be- tray. We Request the Court to Examine These Closely to See if Anything Can Be Found in Any of Them That Would Show Treasonable Intent.....	69
--	----

S.

Testimony of Dr. LeMoyne Bleich, Senior American Officer in the Camp	107
---	-----

T.

On Question of Intent. Kawakita's Testimony.....	114
--	-----

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Adams v. State, 34 Fla. 185, 15 So. 905.....	225
Ah Fook Chang v. United States, 91 F. 2d 643.....	245
Alexander's Cotton, Mrs., 2 Wall. 404.....	93, 113
Allen v. United States, 164 U. S. 492.....	215, 240
American Banana Co. v. United Fruit Company, 213 U. S. 347	97
American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. Ed. 1079.....	257
Anderson v. United States, 318 U. S. 350.....	194
Andres v. United States, 333 U. S. 740.....	256, 257, 258
Ashcraft v. Tennessee, 332 U. S. 143, 88 L. Ed. 1192.....	194
Attorney General v. Ricketts, 165 F. 2d 193.....	122, 123, 188
Bad Elk v. United States, 177 U. S. 529.....	212
Baker v. Hudspeth, 129 F. 2d 779.....	241
Barnard v. United States, 16 F. 2d 451; cert. den., 274 U. S. 736	259
Bollenbach v. United States, 326 U. S. 607, 90 L. Ed. 354....	228, 240
Bollman, Ex parte, 4 Cranch 75, 8 U. S. 554.....	108, 144, 145, 156, 179
Brasfield v. United States, 272 U. S. 448, 71 L. Ed. 345.....	228
Brinegan v. United States, 328 U. S. 160, 93 L. Ed. 1879.....	64
Bruno v. United States, 308 U. S. 287.....	65
Burton v. United States, 196 U. S. 283, 25 Sup. Ct. 250, 49 L. Ed. 482	238
Canty v. Alabama, 309 U. S. 629, 84 L. Ed. 988.....	194
Capital Traction Co. v. Hof, 174 U. S. 873, 43 L. Ed. 881.....	214
Carlisle v. United States, 16 Wall. 147.....	60, 70, 92, 97, 99, 103, 111, 112, 196, 204
Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716.....	194
Chambers v. United States, 237 Fed. 513.....	242
Chandler v. United States, 171 F. 2d 921.....	81, 117, 158, 159, 263

Clark v. Allen, 331 U. S. 508.....	172, 176
Coleman v. Commonwealth, 25 Grath 865, 18 Am. Rep. 711.....	207
Cook v. United States, 288 U. S. 102.....	176
Corson v. United States, 147 F. 2d 437.....	196
Cramer v. United States, 325 U. S. 14.....	
4, 50, 58, 59, 61, 62, 80, 81, 110, 128,	
132, 144, 145, 146, 148, 150, 151, 154, 155,	
156, 157, 160, 161, 165, 201, 255, 262, 263	
Croft v. Harrison, 16 Hiel 164.....	172
Davis v. United States, 160 U. S. 469.....	61
Dejager v. Attorney General of Natou, A. C. 326.....	112
Dennis v. State, 25 L. R. A. (N. S.) 36.....	245
Dooley v. United States, 182 U. S. 222.....	172
Dowdell v. United States, 221 U. S. 325.....	250
Dudley v. State, 113 S. E. 24, 28 Ga. App. 711.....	228
Edwards v. United States, 7 F. 2d 598.....	237
Edye v. Robertson, 112 U. S. 580.....	176
Equi v. United States, 261 Fed. 53.....	171
Falgout v. United States, 279 Fed. 513.....	206
Fillippon v. Albion Vein Slate Company, 250 U. S. 76, 63 L.	
Ed. 853	245
Fina v. United States, 46 F. 2d 643.....	245
Ford v. United States, 273 U. S. 593.....	176
Fore v. Tearget, 97 U. S. 594.....	93, 113
Foster Crown Cases, found in 792, Chap. 3, Sec. 8, p. 216.....	145
Fried, In re, 161 F. 2d 453.....	194
Frohwerk v. United States 249 U. S. 204.....	170
Fujii v. United States, 148 F. 2d 298.....	112, 113
Gerson v. United States, 25 F. 2d 49.....	66
Gibbons v. Van Alstyne, 56 Hun. 639, 9 N. Y. Supp. 157.....	244
Gideon v. United States, 52 F. 2d 427.....	240

	PAGE
Glasser v. United States, 86 L. Ed. 680.....	259
Gloria v. United States, 231 U. S. 9.....	98
Glover v. United States, 147 Fed. 426.....	206
Green & Co. v. United States, 74 F. 2d 6.....	61
Harris v. The Municipal Court, 209 Cal. 41.....	178
Hartzell v. United States, 322 U. S. 680.....	165
Haupt v. United States, 300 U. S. 645.....	161
Haupt v. United States, 330 U. S. 631, 90 L. Ed. 1145.....	
.....62, 134, 144, 148, 157, 201, 255, 262	
Herrera v. United States, 222 U. S. 558.....	113
Holcomb v. Holcomb, 28 Conn. 177.....	207
Hopt v. Utah, 110 U. S. 574.....	248, 249
Hyde v. United States, 225 U. S. 347.....	242
Jansen v. Vrow Christina Magdalena, Bee Adm. 11, 23.....	187
Jaragon Iron Company v. United States, 212 U. S. 297, 63	
L. Ed. 520.....	70, 93, 97, 113
Jennings v. State, 134 Wis. 307, 14 L. R. A. (N. S.) 862.....	245
Johnson v. Browne, 205 U. S. 309.....	176
Jordan v. United States, 22 F. 2d 966.....	228
Joyce v. Director of Public Prosecutions, 1946, A. C. 647.....	120
Kahn v. Garvan, 263 Fed. 909.....	113
Lambright v. State, 34 Fla. 564, 16 So. 582.....	225
Lange, Ex parte, 18 Wall. 872.....	258
La Marrs Executor v. Brown, In re, 92 U. S. 187, 23 L.	
Ed. 650	96, 113
Leitensdorf v. Webb, 20 Hiel 176.....	172
Leonhard v. Eley, 151 F. 2d 409 (C. E. A. 10).....	112
Lewis v. United States, 146 U. S. 370, 36 L. Ed. 1011.....	250
Lilienthal v. United States, 97 U. S. 237, 24 L. Ed. 904.....	61, 63
Lomas v. Texas, 313 U. S. 554, 85 L. Ed. 1513.....	194
Luria v. United States, 231 U. S. 9.....	102

M. Kraus & Bros. v. United States, 327 U. S. 614, 90 L. Ed. 894	112
MacLeod v. United States, 229 U. S. 416.....	172
Malinski v. New York, 324 U. S. 401, 89 L. Ed. 1029.....	194
Manley v. Georgia, 279 U. S. 1.....	114
Mattox v. United States, 146 U. S. 140.....	242, 245
McConnell v. Hector, 3 Bos. 6 Fuller's Reports, 113.....	91
McCook v. United States, 263 Fed. 55.....	206
McNabb v. United States, 318 U. S. 332.....	194
Mexico v. Hoffman, 324 U. S. 30.....	46, 93, 112, 116
Miller v. United States, 155 U. S. 438.....	61
Miller v. United States, 11 Wall. 268.....	93, 113
Minor v. Happersett, 21 Wall. 165.....	188
Moyer v. Peabody, 312 U. S. 78, 53 L. Ed. 410.....	97
Murray v. The Charming Betsy, 6 U. S. (2d Cranch) 64, 2 L. Ed. 208	103
Nardoni v. United States, 308 U. S. 338.....	194
Neely v. Henkel, 180 U. S. 109.....	176
New Orleans v. Steamship Co., 20 Wall. 387.....	172
Nick v. United States, 122 F. 2d 660.....	238
Nigro v. United States, 4 F. 2d 781.....	240
Okamoto v. United States, 152 F. 2d 905.....	112, 113, 114
Oyama v. California, 332 U. S. 633.....	104
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333.....	114
People v. Bruneman, 4 Cal. App. 2d 75, 42 P. 2d 891.....	228, 244
People v. Curtis, 98 P. 2d 228.....	228
People v. Davidian, 20 Cal. App. 2d 720.....	228
People v. Demeaux, 160 N. W. 634, 194 Mich. 18.....	228
People v. Faber, 199 N. Y. 256, 92 N. E. 674.....	227
People v. Fong Ah Sing, 74 Cal. 253.....	206
People v. Hunckler, 48 Cal. 331.....	258

	PAGE
People v. Kelly, 203 Cal. 128, 263 Pac. 226.....	245
People v. Olcott, 2 Johns. Cas. 301, 1 Am. Dec. 168.....	227
People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.....	245
People v. Sheldon, 155 N. Y. 268, 53 N. E. 841, 41 L. R. A. 644	226, 227
People v. Vasquez, 93 Cal. App. 448.....	206
People v. Walker, 209 P. 2d 834.....	226
People v. Webb, 38 Cal. 476.....	258
Perkins v. Elg, 307 U. S. 325.....	
.....6, 46, 70, 94, 96, 98, 107, 111, 116, 122, 188 196 209	
Peterson v. United States, 213 Fed. 920.....	233, 234, 239
Portier v. LeRoy, 1 Yeates (Penn.) 371.....	187
Pryor, Fed. Case No. 16095, 2 Biff. 344.....	153
Quirin, Ex parte, 317 U. S. 1.....	
.....60, 70, 81, 82, 89, 110, 111, 112, 113, 172	
Radich v. Hutchins, 95 U. S. 210.....	112
Ray v. United States, 114 F. 2d 508.....	245
Reid v. United States, 73 F. 2d 153.....	46, 89, 93, 109, 111, 116
Rex v. Joyce, 173 L. R. T. 377.....	120
Rickard v. State, 74 Ind. 275.....	244
Robinson v. United States, 259 Fed. 685.....	
.....62, 132, 144, 145, 158, 201	
Rosborough v. Rossell, 150 F. 2d 809.....	89
Ross v. McIntyre, 140 U. S. 453, 35 L. Ed. 581.....	172, 173
Ross, In re, 44 Fed. 185.....	173
Santissima Trinidad, 7 Wheat. 283.....	187
Savorgnan v. United States, 94 L. Ed. (Adv. Op.) 203.....	
.....6, 70, 98, 188, 196, 209	
Schaub v. Berggren, 143 U. S. 444.....	249
Screws v. United States, 89 L. Ed. 1495, 325 U. S. 91.....	112, 196

Silverthorne Lumber Company v. United States, 251 U. S.	
385	194
Smith v. State, 40 Fla. 203, 23 So. 854.....	225
Snyder v. Massachusetts, 290 U. S. 606.....	248, 249, 250
Society for the Propagation of the Gospel v. New Haven, 8	
Wheat. 464	176
State v. Bybee, 17 Kan. 462.....	226
State v. Chandler, 274 Pac. 303.....	248
State v. Kelly, 57 N. H. 549.....	207
State v. Place, 29 S. Dak. 489.....	224
State v. Stephenson, 54 S. C. 234, 32 S. E. 305, 11 L. R. A.	
(N. S.) 178	225
State v. Wroth, 15 Wash. 621, 47 Pac. 106.....	244
Stephan v. United States, 133 F. 2d 87; cert. den., 319 U. S.	
781	129, 158
Stewart v. United States, 300 Fed. 769.....	228, 239
Streling v. Constance, 287 U. S. 378, 77 L. Ed. 375.....	97
Stough v. State, 128 P. 2d 1028.....	248
Taber v. United States, 81 Ct. Cl. 142; cert. den., 296 U.	
S. 96	113
Takeguma v. United States, 156 F. 2d 437.....	112, 113, 114
Talbot v. Jansen, 3 Dall. 383.....	187
Territo, In re, 156 F. 2d 142.....	
.....59, 60, 70, 72, 81, 84, 89, 96, 98, 105, 108, 110, 111, 113, 126	
Tervin v. State, 37 Fla. 396, 20 So. 551.....	225
The Benito Estinger, 176 U. S. 568.....	93
The Bothnea, 2 Wheat. 169.....	114
The Eliza, 4 Dall. 37.....	93
The Frances, 8 Cranch 335.....	93, 113
The Grapes Hot, 9 Wall. 129.....	172
The Marian Susan, 1 Wheat. 46.....	93, 113

	PAGE
The Rapid, 8 Cranch 155.....	93
The Venus, 8 Cranch 253.....	91, 93, 113
Thompson v. Utah, 170 U. S. 343, 42 L. Ed. 1061.....	213
Tot v. United States, 319 U. S. 467.....	67
United States v. Bayer, 156 F. 2d 964.....	194
United States v. Bayer & Radovich, 331 U. S. 532.....	194
United States v. Burr, 25 Fed. Case No. 14693.....	108, 109
United States v. Di Re, 332 U. S. 581, 92 L. Ed. 210.....	212
United States v. Ferris, 19 F. 2d 925.....	176
United States v. Fricke, 259 Fed. 673.....	92, 151, 153
United States v. Gooding, 12 Wheat. (25 U. S. 473).....	144
United States v. Greathous, Fed. Cas. No. 15254, 4 Sawyer 457, 2 A. BBU's 364.....	153
United States v. Haupt, 47 Fed. Supp. 836.....	151, 158
United States v. Herberger, 272 Fed. 278.....	171
United States v. Johnson, 124 U. S. 236, 31 L. Ed. 389.....	46, 93
United States v. Kuhn, 49 Fed. Supp. 407.....	104
United States v. Minoru Yasui, 48 Fed. Supp. 40.....	127
United States v. Rauscher, 119 U. S. 407.....	176
United States v. Rice, 4 Wheat. 246.....	172
United States v. Samuel Dunkel & Co., 173 F. 2d 506.....	240
United States v. Schonweiler, 19 F. 2d 387.....	176
United States v. Sorcey, 151 F. 2d 899.....	242
United States v. Stephan, 50 Fed. Supp. 738.....	129, 151, 158
United States v. Werner, 247 Fed. 708.....	158, 170
United States v. Wilson, 28 Fed. Case No. 16730, pp. 699, 718	144
United States v. Yasui, 48 Fed. Supp. 40.....	
.....	120, 121, 181, 187, 198, 199
Upchurch v. State, 38 S. W. 206.....	248
Waite v. Mississippi, 124 So. 803.....	228

	PAGE
Wallace v. Harmstad, 44 Pall. (8 Wright 492, 501).....	103
Ward v. Texas, 316 U. S. 547, 86 L. Ed. 1663.....	194
Wheaton v. United States, 133 F. 2d 522.....	242
White v. Texas, 310 U. S. 530, 84 L. Ed. 1342.....	194
Whitney v. Robertson, 124 U. S. 190.....	89
Wimmer v. United States, 264 Fed. 11.....	171
Wong Kim Ark, 169 U. S. 649, 42 L. Ed. 890.....	103
Worthington v. Menthner, 96 Ala. 310, 17 A. L. R. 407, 7 So. 72	207
Yamashita v. United States, 327 U. S. 1.....	60, 89, 172

MISCELLANEOUS

Articles of War, Arts. 33, 81, 82.....	172
Cole. Litt. 155 A.....	213
Geneva Convention of 1929, Art. 27.....	91
Geneva Convention of 1949.....	86, 90
Grant, President, Fifth Annual Message to Congress, 1873.....	186
Hague Convention, 1899.....	86, 89, 90
Hague Convention, 1907.....	86, 89, 90
Inter-American Convention on the Status of Aliens, Feb. 20, 1928, Art. II	96
Japanese Rules and Regulations for Prisoners of War.....	82
Journal de Droit International (Crunet, 1916, p. 1695).....	88
Lawrence's Wheaton, p. 925.....	186
13 Op., 89, Hoar, 1869.....	188
Readers Digest, January, 1946.....	150
Senate Ex. Doc. 91, 33rd Cong., 1st Sess.....	186
Senate Ex. Doc. C. 38, 36th Cong., 1st Sess., p. 153.....	186
Solicitors Opinion 1, 1910, p. 297.....	102
State Department Bulletin, Sec. 20.....	6, 95, 96
Treaty of the Hague.....	82, 86

Treaty of the United States with Japan of June 17, 1857.....	173
Treaty of the United States with Japan of July 29, 1858.....	173
Treaty Series 539, Rules and Regulations for the Government of Japanese Camps.....	110
Treaty Series 846, Rules and Regulations for the Government of Japanese Camps.....	110, 126
United States list of treaties in force Dec. 31, 1941, p. 39.....	86
United States War Department Digest of Opinions of the Judge Advocate General of the Army, 1912-1930, with 1931 Supp. (1932), Sec. 22124, p. 1097.....	88

STATUTES

Act of Feb. 10, 1855 (10 Stat. at L. 604, Chap. 71, Sec. 1).....	123
Code of Civil Procedure, Sec. 1959.....	66
Code of Civil Procedure, Sec. 1961.....	64
Federal Regulations July 30, 1937; May 19, 1941.....	6
Federal Rules of Criminal Procedure, Rule 6.....	211
Federal Rules of Criminal Procedure, Rule 7(f).....	259
Federal Rules of Criminal Procedure, Rule 43.....	42, 65
Florida Compiled General Laws (1927), Sec. 4368.....	225
Florida Compiled General Laws (1927), Sec. 8402.....	225
Florida Revised Statutes of 1892, Sec. 1093.....	225
Florida Revised Statutes, Sec. 2925.....	225
Immigration Regulation 315.9.....	2, 50, 68, 70, 79, 92
Maine Revised Statutes of 1903, Chap. 84, Sec. 100.....	226
Nationality Act of 1940, Sec. 401, Subds. a, b, c, d, (8 U. S. C., Sec. 801).....	49, 92, 122, 124, 125, 127
Nationality Act of 1940, Sec. 402, Subds. a, b, c, d (U. S. C., Sec. 802)	32, 50, 70, 92, 105, 115
Nationality Act of 1940, Sec. 406.....	182
Nationality Act of 1940, Secs. 800-808.....	2
Nationality Act of 1940, Sec. 801, Subds. a, b, d, e, f.....	36, 64

	PAGE
Nationality Act of 1940, Sec. 808.....	184
Nationality Code, Title 800, Sec. 8.....	107, 120, 185, 198
New Federal Judiciary Code, Title 28, Sec. 1254, Subd. 1.....	2
Passport Laws, Code 1.6.....	6
Penal Code, Sec. 841.....	212
Prisoners of War Punishment Law, Law No. 41, March 9, 1943, Art. 5	87
Prisoners of War Punishment Law, Law No. 41, March 9, 1943, Art. 6	87
Revised Statutes, Sec. 1993.....	123
Revised Statutes, Sec. 1999 (15 Stat. L. 223, 224).....	185
Rules of Prisoner of War Camps, Art. 8, p. 22.....	29
South Carolina Civil Code (1902), Sec. 2994.....	225
South Carolina Civil Code (1912), Sec. 4050.....	225
South Carolina Code of Civil Procedure (1922), Sec. 582.....	225
South Carolina Code of Laws (1902), Sec. 2949.....	225
South Carolina Code of Laws (1942), Sec. 642.....	225
South Carolina Code of Laws (1932), Sec. 642.....	225
South Carolina General Statutes, Sec. 2268.....	225
South Carolina Revised Statutes, Sec. 1797(5) 358.....	225
South Carolina Revised Statutes, Sec. 2409.....	225
11 Statutes at Large 723.....	174
12 Statutes at Large 1056.....	175
54 Statutes at Large 1169, Sec. 401(b).....	50, 118
United States Code, Title 8, Sec. 801a	36, 64, 67, 118
United States Code, Title 8, Sec. 801b	36, 64
United States Code, Title 8, Sec. 801c	36, 64
United States Code, Title 8, Sec. 801d	36, 64
United States Code, Title 8, Sec. 807a.....	120

United States Code, Title 18, Sec. 1 (1946 Ed.).....	
.....	2, 35, 44, 90, 104
United States Code, Title 18, Sec. 3 (1946 Ed.).....	
.....	26, 42, 54, 79, 131, 173, 202
United States Code, Title 22, Sec. 143.....	172, 179, 202
United States Code, Title 22, Sec. 144.....	172, 179, 202
United States Code Annotated, Title 8, Sec. 6.....	123
United States Code Annotated, Title 22, Sec. 140.....	173
United States Code Annotated, Title 22, Sec. 141.....	
.....	172, 173, 179, 202
United States Code Annotated, Title 22, Sec. 142.....	
.....	172, 173, 179, 202
United States Code Annotated, Title 22, Sec. 145.....	
.....	172, 173, 179, 202
United States Constitution, Art. I, Sec. 7, Clause 3.....	82
United States Constitution, Art. I, Sec. 8.....	81, 82, 86
United States Constitution, Art. III, Sec. 3.....	2, 255
United States Constitution, Art. IV, Sec. 2, Clause 3.....	82
United States Constitution, Art. VI	109, 110
United States Constitution, Fourth Amendment	211, 213
United States Constitution, Fifth Amendment	
.....	42, 56, 213, 223, 248, 249, 250, 253
United States Constitution, Sixth Amendment.....	
.....	172, 173, 177, 248, 249
United States Constitution, Seventh Amendment.....	32, 248
United States Constitution, Fourteenth Amendment	
.....	5, 36, 44, 61, 123, 250
War Department, Rules of Land Warfare, Secs. 100-104.....	91
Wisconsin Statutes of 1898, Sec. 2855.....	226

TEXTBOOKS	PAGE
11 American & English Annotated cases, p. 1132.....	224
29 American Law Reports, pp. 1127, 1128.....	206
Chafee, Free Speech in the United States, pp. 259-260.....	171
23 Corpus Juris Secundum, Sec. 1043, 612 La. 98, 135 S. W. 2d 111	228
Floury, Prisoners of War, p. 7.....	88
Floury, Prisoners of War, p. 23.....	89
Floury, Prisoners of War, p. 30.....	97
Guiding's Powers Under the Constitution, pp. 340-342.....	113
3 Hackworth, Digest of International Law, Sec. 225, p. 352.....	96
Hale's International Law, Chap. 2, Sec. 131.....	86
Hale's International Law, Chap. 3.....	86
Hale's Pleas of the Crown, pp. 164-165.....	91
Hall's International Law, pp. 490, 497	86
58 Harvard Law Review, p. 430, Hurst, Treason in the United States	171
Harvard Law School, p. 1126, Somers, The Security of Eng- lishmen's Lives, p. 94.....	213
Hyde's International Law, Sec. 675.....	86
3 Hyde's International Law, p. 1851.....	91
Jefferson Works 5102.....	213
7 Jefferson Works, p. 73.....	186
2 John Adams Works, p. 370.....	186
7 John Adams Works, p. 174.....	186
9 John Adams Works, pp. 313, 314, 321.....	186
10 John Adams Works, p. 282.....	186
Jones' Commentaries on Evidence, Sec. 2470, p. 4893.....	207
2 Malloy, U. S. Treaties and Conventions, pp. 2042, 2049.....	86

	PAGE
Oppenheim's International Law (6th Ed.).....	86
Thayer on Evidence, p. 85.....	213
Wharton on Conflict of Laws, Sec. 5.....	186
1 Wharton on Evidence (3d Ed.), p. 403.....	207
Whiting's War Power Under the Constitution, pp. 340-342.....	96
Wigmore on Evidence, Sec. 2036, pp. 263, 264, Note 1.....	201
Winthrop's Laws of War (Army Doc. 1001), p. 778.....	202
Winthrop's Military Law and Precedents (2d Ed.) (Army Document 1001), p. 776.....	130
Winthrop's Military Law and Precedents (2d Ed.) (Army Document No. 1001), pp. 778, 792.....	85
2 Winthrop's Military Law and Precedents (2d Ed.), Sec. 1228, Point 2.....	86

No. 12,061

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TOMOYA KAWAKITA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the District Court of the United States for the
Southern District of California Central Division.

Honorable William C. Mathes, Trial Judge.

Opening Brief on Behalf of Tomoya Kawakita From
the Judgment and Sentence of Death.

Statement.

This is an appeal from the judgment and sentence of death of Tomoya Kawakita, a dual citizen of both Japan and the United States from birth, allegedly for Treason, while a resident of Japan, and for alleged acts in a prisoner of war camp in Japan in connection with the disarmed labor battallion held by the then Japanese nation pursuant to international agreement. It was conceded by the government that Kawakita was a citizen of Japan at all times.

Jurisdiction.

Jurisdiction is conferred by the Constitution of the United States, Article III, Section 3, by Title 18, subdivision 1, U. S. Code (1946 Edition), and by Title 1254, subdivision 1, Title 28, New Federal Judiciary Code.

The judgment was pronounced by the District Court of the United States, Southern District of California, Central Division, by the Honorable William C. Mathes, Judge presiding, on October 5, 1948.

Notice of appeal was duly and regularly taken to the United States Court of Appeals for the Ninth Circuit [October 5, 1948, Clk. Tr. p. 454], and time has been enlarged by various orders of this court.

Constitutional Provisions, Statutes and Regulations Involved.

These, because of their length, are in the appendix. They are:

Article III, Section 3, U. S. Constitution.

Title 18, subdivision 1 (1946 Edition), U. S. Code.

Sections 800 to 808 of Nationality Code.

Constitutional provision regarding the Law of Nations—International Law and treaties being a part of the Supreme Law of the land.

The section of the Immigration Code regarding the presumption of expatriation.

Certain regulations in the treaties regarding prisoners of war.

State Department Regulations regarding dual citizenship.

Immigration Regulation 315.9.

Summary of the Facts.

Tomoya Kawakita, who was born in the United States of Japanese born parents, citizens of Japan, and who was therefore claimed by Japan as a citizen of that country from the date of his birth, appeals from a judgment of death, which judgment was imposed by the judge following a verdict returned by a jury after eight long, hot and tiring days of deliberation, four of which were enforced by the court with a mandate that it was *their duty to agree* after the jury had reported it had considered every phase of the case and that it was hopelessly deadlocked and twice requested to be discharged and after it had become evident that bitter and acrimonious feeling and fear, fatal to the calm, deliberate and fair consideration which the law contemplates had thoroughly permeated the jury. The jury members had also separated while in the custody of the marshals. Doctors had attended jurors for illness during their deliberations without the knowledge of the defendant or his counsel, or without their consent or approval.

Numerous war veterans suffering from the psychosis of battle, bitter at the enemy that had made them captive slaves, were paraded before the jury to tell their alleged experiences at Camp Oeyama. They were all, again, heroes for a day, on the witness stand. They repeated tales of their war imprisonment and suffering which, we sincerely regret, deeply affected—and infected—many of the jurors and finally led to the conquest of one more “Jap” under the guise of a “treason” prosecution and conviction.

That these witnesses also deeply affected the learned and brilliant trial judge is shown by the fact that he compelled the jury to deliberate under the circumstances above related and expressed bitterness toward the defendant at the

time of sentence as is evidenced by his remarks, which were embodied in the record at the time of sentence and in which he criticized by necessary implication the executive and judicial clemency which had been afforded in all other cases involving the same charge, and the discretionary punishment which the Congress has permitted in this type of case.¹

Kawakita went to Japan while still a minor—17—and the petty acts alleged to constitute the treason assertedly occurred, if they occurred at all, while he was drafted by the Government of Japan to act as an interpreter in a prisoner of war camp under the Japanese military authorities in Japan, while that country was able to enforce its sovereignty over him and its demand that he render it the allegiance which it claimed was due from him as a citizen of that country and while he was presumptively expatriated from the United States. The record, as will be hereinafter more specifically pointed out, discloses the reception of much evidence which we believe inflamed the passions and excited the resentment of some of the jurors and which could not constitute either intent to betray or giving “aid and comfort to the enemy,” under any reasonable definitions of those terms.

Under the facts of this case, in its setting in a prisoner of war camp in Japan, then having complete sovereignty of its own and acting under international treaty regarding prisoners of war, Kawakita was not, and could not, be guilty of the high crime of treason.

¹The trial court said in effect that the only worth-while use for the life of a traitor is to execute him to set an example to others [R. 5856]. Under this expression every man in the Continental Congress from Washington on down should have been executed. See footnote 18, *Cramer v. U. S.*, 325 U. S. 14.

Eight overt acts were found by the jury. All of them related to prisoners of war under the control of Japanese military while Japan was still a nation. One was for allegedly kicking a prisoner of war to cause him to exert himself when he admittedly was doing nothing at the time; another was for failing to carry a second bucket of paint, the required quota, which this prisoner was not carrying; a third was for failing to return a prisoner of war back to camp for five hours after injury, although no trains were shown to be available. The other five acts were punishment acts carried out by military officers as punishment for the burglary, theft and destruction of government property.

Detailed Summary of Facts.

Tomoya Kawakita was born on September 26, 1921, at Calexico, California, United States of America. [R. 4037.] His father and his mother were each born in Japan and were at all times therefore subjects of Japan and were Issei and not eligible to become citizens of the United States, and at all times the parents were citizens of Japan. [R. 3986.]

Under the Fourteenth Amendment to the Constitution of the United States, Kawakita became a citizen of the United States at the time of and by reason of his birth in the United States, and remained such as long as he was *subject to the jurisdiction thereof*. By the Nationality Act of 1940 he was presumptively expatriated by statute after six months' residence in Japan.

Under the laws of Japan, he became a citizen of Japan by reason of the birth and citizenship of his parents in Japan and was a citizen of Japan at all times mentioned in the indictment.

He was therefore a dual citizen. Under American decisions and under regulations of the American State Department he owed his paramount allegiance to the country in which he was residing. (Passport Laws, Code 1.6; Federal Regulations July 30, 1937; May 19, 1941.) By the Nationality Act of 1940 he was presumptively expatriated from the United States. (See appendix.)

The Government of the United States, at the time of his birth, and at all times mentioned herein, recognized *dual-citizenship* and the necessary consequences of such dual-citizenship. (See *Perkins, Secretary of Labor, v. Elg*, 307 U. S. 325-50, *Savorgnan v. United States*, 94 L. Ed. (Adv.) 203, and also Defendant's Exhibit DP, State Department Bulletin, Sec. 20.) It recognized the paramount allegiance of a dual citizen to the country where he is residing, if a citizen of that country also.

Kawakita's father was Yasaburo Kawakita, who maintained a grocery store in Calexico, California. [Rep. Tr. 3986-7.]

At the age of seventeen Tomoya Kawakita made a trip to Japan with his father and obtained an American passport at that time. [Exhibit 12A; R. 4040.]

Kawakita's father sent him to elementary school and to high school in Calexico, California. There he attended Hoffman School and Rockwood Junior High School and Union High School [R. 53], where he was graduated. At the time of his graduation, he was doing Boy Scout work, he was helping his father in his grocery store, and he participated in the solicitation of American Red Cross funds.

In 1939, his father was requested by his grandfather, then residing in Japan, to bring his grandson over to

Japan as he would like to see the grandson before he passed away. The grandfather was then 83 years old. [R. 3989.]

Tomoya Kawakita received an American passport and went to Japan on that passport, in 1939. The passport was good for two years, or to 1941. It was renewed to 1942, and it then expired. There was no passport during any of the times covered by the indictment. The war also suspended any protection which this government gave to any of its citizens in Japan. The Nationality Act of 1940 suspended the duty of allegiance to the United States by reason of Kawakita's continued residence in Japan and his obligation of loyalty to Japan. This loyalty has to be 100% loyalty while residing there. It also suspended his right to call on the United States for protection unless and until he overcame the presumption of expatriation. That overcoming of the presumption of expatriation was and is only as of the date when overcome.

While in Japan, Kawakita was persuaded to go to school the Meiji University in Japan in preparation of commerce between the United States and Japan in the export and import field. His father left his son in Japan for educational purposes and returned to the United States.

The father provided \$25.00 per month to him during this time to maintain him, and in payment of his education. [R. 3992.] Kawakita attended preliminary school at the Nichi-Bei Home where he studied the Japanese language and took the entrance examination for the University.

Kawakita renewed his passport, which renewal was to December, 1942, at which time the passport expired. [Exhibits 2a, b, c; R. 4162-4.]

In the meantime, war broke out on December 7, 1941. Kawakita remained at the University while many of his fellow students and classmates were entering the Military Service of Japan and going to war against the United States.

Kawakita testified that he did not enter the Japanese *army* because he did not want to fight his former classmates who had gone to school with him in Calexico, California. [R. 4047.]* He never did, although he was eligible to, receive a commission in the Japanese army. However, he was drafted by the Japanese government as a Japanese citizen, subject to the draft, to serve in its labor draft. [R. Exhibit Z.]

At that time Kawakita was registered at the University as a foreigner and his address was then given as Calexico, California, and he was registered in accordance with the requirements of *alien* registration at the local police station. [R. 4051; Exhibit CR; R. 3866 *et seq.*]

On about March 2 or 3, 1943 [R. 4051], he was stopped by a Japanese policeman who wanted to know something

*Q. By Mr. Lavine: As a result of that military training what had you earned as a result of it that you received in the University? A. I received my credits in the military training and was entitled to enter an officer training school and was entitled to receive the rank of second lieutenant.

Q. Did you take that opportunity? A. No, sir.

Q. Why didn't you? A. Because I did not want to fight against the United States. I had friends, schoolmates at home whom I have associated with while I was in high school. [R. 4047.]

about his status.* Kawakita told the policeman that he was born in the United States and they told him that he had to make an election whether he was going to be Japanese or American. They told him the way to do that was to have his name entered on the family Koseki. This proceeding is described by Kawakita in detail. [R. 4053.]

He went down to the City Hall of the City of Suzuka, where he made a formal declaration. He had his name entered by the Registrar at the City Hall, at the request of his uncle, Yazaemon Kawakita, in the family Koseki. His uncle went to the Registrar who took care of the family Koseki; his uncle told the Registrar that this is his nephew and he desires to enter his name formally in the family Koseki as a Japanese subject. [R. 4385.] The Registrar asked when he was born and Kawakita told him he was born on September 26, 1921. The Registrar asked him if it was his desire to enter his name in the family Koseki as a Japanese subject and he told him "yes." There were entries made on the Koseki and then Kawakita took the family seal and stamped it on the record. This, according to Japanese law, was a reaffirmation of allegiance to Japan. [Exhibit A.] The Registrar then made three or four copies of the Koseki which Kawakita took to the police station for removal of his name from the alien registration records. Upon presentation of the Koseki to the local police, and leaving it there, his name was removed from the alien registration, and he was allowed to go about Japan as he pleased. [R. 4053.] Japan regarded him as one of its citizens, with paramount duty of loyalty to it.

*This was very similar to the stopping of Americans by police to show their draft card.

Kawakita also took the document to the place where he was going to work, and where he did become employed, to satisfy them that he was a Japanese national. [R. 4386.]

Foreigners could not be hired to work in a defense plant. [R. 4050.] The company was under the control of the army.

As Kawakita was cut off from any money from the United States and from his father, he sought a job with the Nippon Yakin Kaisha Company, of which Saturo Mori was president. [R. 471.] The company had offices in Tokyo and had a nickel mine at Oeyama at Yosa-Gun Kyoto; they employed about 500 men to smelt. The prisoner of war camp was controlled by the Japanese military department and received its orders from it. [R. 3726.] All orders were given by Lt. Hazama. [R. 3727.] In 1943 they expected prisoners of war from Canada and Australia, and for that reason they needed someone who spoke English. [R. 473.] Tomoya Kawakita was hired to act as an interpreter. He had no position of authority. He was assigned to work at Oeyama in Kyoto province. [R. 473.] Mr. Mori knew he could not hire any foreigner. [R. 477, 478.] He at all times believed that Tomoya Kawakita was a Japanese national. Kawakita went to work in the mine and was assigned to interpret between the British and Canadian prisoners of war and the Japanese officials. In the summer of 1944, Kawakita went to China on a *Japanese* passport as a Japanese subject in behalf of bringing back some Chinese to work in another section of the company. [R. 4059.] The work at the camp was supervised and directed by military personnel. Kawakita did not attend the conferences. [R. 3722.]

Stranded in Japan because of the war, cut off from his father's allowance and his grandfather having died, Kawakita received financial help from a friend of his father, named Takeo Miki, until he graduated from college. He then told Mr. Miki he did not want to be a further burden upon him and would like to get a job somewhere. [R. 4048.] He could have gone into the Japanese army, and by reason of his credits in the military training he had received in college he was entitled to receive the rank of second lieutenant. [R. 4047.] He did not take that opportunity "because I did not want to fight against the United States. I had friends, schoolmates at home whom I have associated with while I was in high school." [R. 4047.]

Mr. Takeo Miki told the defendant that the Oeyama Nickel Industrial Co., Ltd., wanted somebody who could speak English and would need him for the service. [R. 4048.] In July of 1943, he was interviewed by Mr. Hayakawa, General Affairs Section of the Oeyama Nickel Industry Co.; Mr. Hayakawa took his personal history and asked him if he had Japanese nationality. He told Mr. Hayakawa, "I have." He told Mr. Hayakawa his name was registered in the family Koseki at Miye Prefecture. [R. 4049.]

Mr. Hayakawa told him that he would need two more interpreters and Kawakita introduced Mr. Meiji Fujisawa and Mr. Inoue to Mr. Hayakawa at the main office in Tokyo. Kawakita had Japanese nationality and Mr. Inoue said that he was in the process of getting Japanese nationality. [R. 4050.]

Mr. Hayakawa sent Mr. Kawakita and Mr. Inoue to Oeyama. He told them that they were to interpret between the prisoners of war and the Japanese military

personnel. "He told us that we were to take orders from the camp authorities, which was the military authority. He told us where we were to live." [R. 4055.]

Prior to that Mr. Takeo Miki, in Tokyo, told Kawakita that the British and Canadians were coming, that the interpretation would be between British and Canadian prisoners of war.

On arriving at the camp the defendant reported to (Military) Lieutenant Hazama, who was camp commandant of the camp. [R. 4056.] Lieutenant Hazama told the defendant and Mr. Inoue that they were to take orders from the military authorities of the camp, and that the place where the prisoners of war were working was a military zone. He said that the defendant was to take orders, to translate or interpret between the company authorities or the military authorities and the prisoners of war. "He told us to act in a stern, military manner and when we interpret between the prisoners of war and the Japanese military authorities in the case there is an order, when the military authorities and the Japanese foremen give orders to the prisoners of war, to interpret it in a firm and clear military voice, just as the Japanese military officer who speak English will give orders to his subordinate." [R. 4056.] He also gave orders that Kawakita should speak nothing, "we should not speak anything about the war, political, and about our personal selves, otherwise it might arouse suspicion and we will be severely punished by the military authorities and even may be killed by the authorities." [R. 4057, 4105.] Lt. Hazama was top man at the camp and directed all military personnel. [R. 3789.]

Meiji Fujisawa was required to become a Japanese National to work in the plant. He received a special permit from the army to work at the company while he was getting Japanese nationality. [R. 4057.] Thereafter he received Japanese Nationality by entering his name in the family register or Koseki. [R. 3594.]* The State Department construed this as expatriation or a loss of American citizenship. The three interpreters then arranged their work between them, alternately, at the mine, the factory and the camp. [R. 4057.] In December, 1943, Kawakita

*On the question of establishing his Japanese citizenship Meiji Fujisawa, another interpreter, testified as follows [Reading from page 3594 of the Record]:

"Well, Mr. Hiyakawa asked me whether I had Japanese citizenship or not and I told him that I did not have any and he told me that the company could not hire any foreign nationals and besides the prisoner of war camp will be under the direct jurisdiction of the army, so the company could not hire any foreign nationals. And he told me that I will have to get a Japanese citizenship before the company can employ me. So I told him I will apply for Japanese citizenship and then he told me for further instructions to report to the Uataki factory in Kyoto."

Then he goes on to tell what happened there; and then I asked him a little later on:

"Well, what did you do thereafter with reference to your Japanese nationality, if anything? A. Well, my name was entered in the Koseki, not in my parents' Koseki but I had to establish a separate Koseki.

Q. You established a separate Koseki? A. Yes, sir.

Q. Were you then married? A. No, sir.

Q. You established a separate Koseki. Will you explain to us what you did? A. Well, I don't know—I can't recall where I went, but I think I went to the metropolitan police station and there I told them in order to work in a Japanese firm as an interpreter I would have to get Japanese citizenship, and that I came to apply.

Q. And what happened then? A. I didn't know until December that I had set up a separate Koseki.

Q. And that was December of— A. 1943." [R. 5170-5172.]

was sent to the mine permanently, and the mine was a distance of about twelve miles from the camp and was arrived at by a special train.

When the defendant first came to Oeyama he moved to the Oeyama area which was the mine dormitory. Later he went to live with Kiyoshi Mori, the mine engineer. [R. 4058.]

In August, 1944, he went to China on a Japanese passport issued at the Miyazu police station in the County of Yoza, on company business. He returned about October 23, 1944. [R. 4059.] After he returned there were two different kinds of prisoners of war in the camp than had been there before. They were Americans as well as British. [R. 4060.] Prior to that time he had ascertained when the second group of prisoners of war came in January, 1944, that there were no American boys in the group. [R. 4060.]

On August 1, 1944, a law went into effect in Japan by which Japanese male population not actually in the army were *drafted* for occupational work. They were served with draft papers and they were compelled to work at the occupation to which they were assigned. They could not quit the occupation, nor transfer from it, without the consent of the government. [R. 488.] It was applicable only to Japanese nationals.

Kawakita, as a Japanese citizen, was served with draft papers upon his return from China in the last part of October, 1944. [Exhibit Z and W.] The company was also drafted by the government and became a government controlled company.

In the meantime, in August of 1944, American prisoners of war arrived at Camp Oeyama.

When Kawakita returned from China and he found that Americans were in the camp, he asked Kiyoshi Mori if he could change his job because he didn't want to interpret any more because there were American prisoners of war at the camp. [R. 4061.] Mori, the mining engineer, told Kawakita that the company is under the control of the government and that the company cannot change positions, or places of work, of their own will, that he was frozen in his job. [R. 4061.]

Kawakita also received the draft papers showing he had been drafted on August 15, 1944, in his absence, to work in this job and that he could not leave it, or fail to work without being severely penalized [Exhibits AB and AB-1 and Z] and that he was like a soldier to the orders of the Japanese government.²

American Sgt. James Montgomery in August, 1944, brought a group of 100 American prisoners of war to the camp from the Philippines. Sgt. Montgomery was placed in charge of American prisoners of war through orders of the Japanese Military Personnel. Sgt. Montgomery was a member of the counter-intelligence corps of the United States [R. 4376]—a fact unknown to the Japanese, who made him one of the bosses of the camp. He had been taken a prisoner of war in the Philippines along

²The setting in which Kawakita found himself—in Japan, in a Japanese Military camp, where only persons of Japanese nationality could be employed; where his employment was checked as to his Japanese nationality, and where everyone about him hated him as a Japanese national and thought he was a Japanese national when in fact he was, as stated in the instructions of the court to the jury, a Japanese citizen (regardless of any claimed American citizenship), we respectfully submit, is not a setting in which the overt acts found by the jury could be construed to be treason.

with many of the others. He described very much in detail the camp, its operations as a military camp, all its vocations and the work. [R. 157 *et seq.*]¹ He described

¹[R. 203]:

Q. When you arrived at Camp Oeyama who did you report to?
A. We were just marched up in front of the headquarters building.

Q. Who marched you up in front of the headquarters building?
A. I marched the men under the supervision of the Japanese guards.

Q. And were those Japanese military guards? A. Well, the guards at this camp were a mixed personnel. Some were soldiers in the Japanese army and others were civilian guards. On that day I do not remember.

Q. And when you got to the camp where you were in charge of these men did they get then assigned to places that they were to sleep and to eat and to live? A. Yes, sir.

Q. During the time they were there? A. Yes.

Q. And you say that occurred about August 5, 1944? A. I believe it was August the 6th.

Q. August the 6th? A. Yes, sir.

Q. In this camp were rules posted in the camp? A. Yes, sir.

Q. Rules and regulations for its conduct, isn't that right?

[R. 204]:

A. Well, everything pertaining to the conduct of the prisoners in the camp were posted there. [Rep. Tr. Vol. III, p. 199, line 21, to p. 204, line 2.]

Q. When you arrived there, the British and Australian prisoners of war were there already, were they not? A. There were, I believe, 263 British prisoners of war at Camp Oeyama at the time I arrived, plus the 100 Americans who had arrived the day before, who had left 24 hours before the group I was with had. [Rep. Tr. Vol. III, p. 204, lines 6 to 11, incl.]

[R. 208]:

Q. When you first arrived there, Sergeant, you stated that a military officer was in charge of the camp and his name was Hazama, is that correct? A. Yes, sir.

Q. And did he remain the commandant of the camp at all times? A. Yes; during my entire stay there.

Q. And the camp was, so far as the prisoners of war were concerned, operated and supervised by the military personnel; isn't that correct?

The Court: Which military personnel?

disciplining prisoners of war by the prisoners themselves. [R. 157 *et seq.*] He also admitted he personally disciplined American prisoners of war for theft by slapping.² [R. 227-29.]

After arrival at the camp, Camp Oeyama, the Americans were assigned to barracks, or "hans." The British and Canadians had a subordinate set up of their own for the government of the camp and the discipline of the men which was run by British Sgt. Harvey, Major Beadnell

A. He was commanding officer of the camp. He was responsible for it.

Mr. Lavine: Lt. Hazama. He was commandant of the camp. [R. 209]:

The Court: I think, when you mention military personnel, you should differentiate so there will be no question. You refer then to the Japanese military personnel?

Mr. Lavine: Yes, sir; the Japanese military personnel.

The Witness: Yes, sir.

²American Sergeant Ralph W. Montgomery (Recalled) testified [R. 227]:

By Mr. Lavine:

"Q. . . . At any time while you were at Oeyama camp did you at any time administer punishment to any prisoner of war?

A. Yes, sir.

Q. What punishments did you administer? A. Well, for stealing I slapped, I think, about three men.

Q. And who were those three men, if you recall? A. One fellow was named Everett; that was his surname; another man's name was Hans; and at the moment I can't call the name of the [R. 228]:
third man.

Q. What had they stolen? A. Hans had stolen about three pair of gloves and, I believe, one or two shirts. And the Japanese, when they issued clothing, they only issued one of each item to each prisoner of war, and when a man reported that items of his clothing had been stolen, why, we searched the kits of the men to determine who had taken them. And in both those instances I found the gloves and shirt in the kit of Hans, and the same thing applied to Everett. I think he had either two or three shirts that were not his property.

of the British forces, British Warrant Officer Tugby, and others. After the men were given about a week's rest, they were assigned to duty in Oeyama mine.

The camp itself was run very much in military fashion and much like a prison in the United States, or a military place of confinement. There was a guardhouse at the entrance. The place was completely fenced in, the guards were on duty and no one could leave the enclosed area except under guard. [R. 236.] There was a guard tower somewhat similar to ours in our own prisons. Prisoners of war wore numbers. [R. 200.]*

It was governed by the Japanese military. [R. 157, 208.] Japanese Lieutenant Hazama was Commandant in charge. The military personnel of Japan operated

*[R. 237] Sgt. Montgomery testified:

Q. Now, was it an offense as far as the Japanese rules or Japanese laws were concerned, for prisoners of war to take these vegetables without permission? A. Yes, we were forbade to.

Q. And if prisoners did take them without permission what was the punishment that was meted out to them? A. If they were caught in the act by the Japanese, why, they were beaten; but if it [R. 238]:

was determined by means of investigation who they were, why, it was usually—they were usually given their punishment by—under the auspices of Major Beadnell, Dr. Bleich, Lieutenant Bryant, and the Board of Supervisors."

* * * * *

Sergeant Montgomery testified [R. 260] that "If the man persisted in eating what we called 'the dysentary dilcons and onions' he was usually slapped around a little bit."

* * * * *

[R. 318]:

Q. Sergeant, I take it you are an American citizen, aren't you? A. Yes, sir.

Q. And you have never been punished, have you, for slapping any Americans in the camp? A. No, sir.

and supervised it. [R. 208.] It had Japanese government, rules and regulations. Kawakita was under military orders at all times. [R. 4105-11.] The Japanese bowed to the Emperor every morning.

When the men would arise in the morning they formed in military fashion, they counted off like soldiers, and were sent out to their work on special trains to the mines. When they passed the guardhouse they had to salute the Japanese guards.

At the mine they were assigned to various levels of digging the earth by means of a pick and shovel, to dig up dirt that might contain nickel ore, then to load it into cars. The average quota for Japanese was 800 cars per day. [R. 3733-36.] Kiyoshi Mori, the engineer in charge of the camp, so testified. The quota set up for Americans was one-fourth of what the Japanese were required. Nevertheless, the quota being turned out was only 120 to 165 cars per day. Men would shovel the dirt containing ore into the dump cars, these cars would be dumped automatically. [R. 3733-38.]

Some time in November, or December, 1944, Kawakita told Sgt. Montgomery that the men would have to make a 200 car quota. Sgt. Montgomery was also told this by Lt. Hazama [R. 3733, 3759], the military commandant. Kawakita was told to convey this information by Tamura, one of the camp authorities. [R. 4079.] Kawakita said he interpreted and explained orders of the military and foremen. He was only in the mine a little over four months after the Americans arrived. The balance of the time he was a clerk in the warehouse.

The men seldom made their quotas as ordered by Military Lt. Hazama, however, and continued to do only be-

tween 120 to 165 cars per day. Sgt. Montgomery denied that he told the men not to fill the quota, but indicated that that was what the men agreed to do. They agreed that they would not fill the quota. His attitude was that while the Japanese "were standing over us I told the men to work." [R. 232.]

The men worked around the mine from about the time of their arrival at the mine, a distance of one hour's traveling time from the camp in the special trains in which the men went, from about 8:00 o'clock in the morning, to about 4:00 in the afternoon, with certain rest periods in between. Near the mine there was a medical officer, Japanese, to take care of anyone who needed emergency treatment.

The camp doctor, Dr. Lemoyne Bleich, an American Medical Doctor, a prisoner of war, set up a complete infirmary for the care and treatment of the men. Every day he would inspect the men to determine if they were physically fit to work, and to attend to their medical needs. The Japanese supplied such medicines and supplies as were available. For a time Dr. Bleich kept a complete diary of events in the camp; he was allowed to keep a complete list of the prisoners of war and their physical condition. A complete set of cards, which the doctor kept, were introduced into evidence, and are among the exhibits. Prisoners of war set up their own "court" for the offenses. Physical punishment attended these violations. Sgt. Montgomery slapped some men for stealing. [R. 227-8.] At no time did any man ever complain to American Captain Bleich that Kawakita had mistreated or struck him. Not a single card record reflects nor does Dr. Bleich's diary mention Kawakita as having inflicted any punishment.

After Kawakita arrived from China, some time in the later part of October, 1944, he appeared at the mine as an interpreter and interpreted orders between the Japanese guards and foremen to the American soldiers. Usually, he met with the guards the night before and found what their orders were. There were from 8 to 12 foremen. [R. 4062.] Kawakita would then explain to the Americans what the Japanese foremen told the prisoners of war to do, and sometimes demonstrated it because it was difficult to interpret. He never did this on his own initiative, but only as requested by the foreman. [R. 4061, 4063.] The prisoners of war remained at the mine until March 1, 1945.

During the time that the men were at the mine Kawakita carried an injured American prisoner of war to the hospital center located near the mine on his back for treatment. [R. 3792, 4082.] In order to do so he had to get permission from Mr. Tamura, the foreman at the mine. He helped prisoners of war get extra food supplies in the first part of November. He brought three jo of rice from the home of Kiyoshi Mori, with Mr. Mori's permission, because the prisoners of war said they were not getting enough to eat. [R. 3741-2.] He had to quit because the native Japanese population learned of it and criticized Mr. Mori. [R. 4084.] He also arranged extra dental attention for the prisoners and interpreted between them and the Japanese dentist. [R. 3743]. There were also medical facilities at the mine. [R. 3743, 3792-3.]

March 1, 1945, following suggestions by *Kawakita* to Kiyoshi Mori that the work at the mine was too heavy for the American prisoners of war, the American prisoners

were transferred to the factory near the camp. [R. 3738-9, 3767.] This was considered light duty for the prisoners. [R. 4098.]

As Inoue was the interpreter at the factory, Kawakita was assigned as a clerk in the factory March 1, 1945. [R. 4099; Exhibit AB.] [See the official company records Exhibit No. 6IDK (in English).] Kawakita acted as a bookkeeper [R. 4138] and kept charge of electrical supplies. [R. 4099, 4113, 4138.] A copy of those records, showing the type of work he did, is in evidence as Exhibit DK. [R. 4139.]

American medical orderlies were working at and around the mine. There was also a mine hospital.

From March 1st until the close of the war, and the surrender of the Japanese, to the ending of hostilities on August 10, 1945, Kawakita worked as clerk in the factory which was outside of the camp grounds. On occasions, not over once or twice a month, he would go into the camp on the orders of Lieutenant Hazama to assist Fujisawa and the Camp Commandant in interpreting letters and notes from various prisoners of war. [R. 4102.]

As Americans were winning the war, food was becoming scarcer and scarcer in Japan. This, likewise, affected the supplies in Camp Oeyama. The prisoners of war were also given four and five cotton blankets each for covering in their beds. There were also strict Japanese Government orders against any prisoners eating any vegetables out of the vegetable garden. The American doctor—Doctor Bleich—himself had issued such orders because these vegetables, on account of the nature of fertilization, would make the prisoners sick. It was a serious offense to steal any of the vegetables for that reason, as well as because

of the shortage of food. It was also a serious offense—it just about meant a prisoner of war's "neck" to steal or attempt to steal any food from the storehouse where it was kept. [R. 257.]

Two prisoners of war, J. C. Grant and Thomas J. O'Connor, admittedly burglarized the storehouse and stole scarce rationed food. Woodrow Shaffer stole beans. [R. 2058.] They were caught by the Japanese military authorities, who gave them prompt and severe summary punishment. Regulations covering this subject called for punishment up to the death penalty. (Overt Acts b and d.) O'Connor, it is alleged (Overt Act d) was struck and beaten and pushed into the fire drain or cesspool, and kept there for a time. Likewise, the same punishment was given to Grant. (Overt Act b.) Overt Act k, Shaffer incident. Prisoners were forbidden not only by the Japanese but by Dr. Bleich from stealing and eating vegetables. No other punishment, however, was administered for their burglary and thefts.

It is alleged that Kawakita came into the camp when these punishments were being administered by the Military in charge and that he assisted the military in the punishments being administered. These are charged as "*treasonable*" overt acts b and d and k, on which the jury convicted.

It was a very serious offense, also, for prisoners to cut up blankets or destroy any Japanese government property. Lt. Hazama ordered the prisoners to punish each other, by striking each other with their fists. This they carried on between a half an hour and an hour. Kawakita, according to the Government witnesses, came along when this was going on and allegedly assisted the Military in car-

rying out this punishment by observing the men and striking them when they failed to punch each other. The jury also found this (Overt Act c) to be an act of "treason."

Two other alleged overt acts of "treason" also occurred in the military compound as punishment. Two American prisoners of war, named Carrier and Simpson, along with others, returned into the camp earlier than the time regularly fixed for their quitting work. One of the Japanese Military Officers, Sergeant Ichiba, as punishment, ordered them to run around the compound until *he told them to quit*. Carrier and Simpson lagged behind and Kawakita, who had come into the compound, was supposed to have told them to "hurry up" and catch up with the others, and they were required to run around the compound a few more times than the other prisoners, for lagging. This also was found to be an act of "treason." (Overt Act g.)

The other alleged overt act was in requiring John J. Armallino to carry two buckets of paint, according to his testimony (which was the quota required of each prisoner of war to carry) when he was only physically able to carry one bucket (Overt Act j) and kicking him.

The jury, on all of the other transactions alleged, was unable to make any finding after eight days deliberation.

Right after the Japanese surrender on August 10, 1945, the Emperor made an announcement, and all of the Japanese officials listened and obeyed. They then turned the camp over to the Americans as their captors. At that time there were forty-five (45) American officers in the camp who had up to then been prisoners of war. The Senior American Officer, Major Martin, was placed in charge of the camp. The Japanese took orders from and

obeyed him. Sergeant Montgomery, Chief Counter-Intelligence Officer, who had been made the "so hanchō," or a sort of petty officer in charge of the Americans, by the Japanese, now acted on behalf of the Americans. At the trial he did not even remember the name of the Major who became the Commanding Officer of the Camp. [R. 251.] We mention this to show how the memory fades. Also, when shown a photograph of the American officers taken at the Camp, he was not able to pick out very many of them, or give their names. He also had difficulty in identifying the Japanese personnel.

Immediately upon the Americans taking over the camp, there was a flag raising ceremony. Kawakita became the principal interpreter and helper of the Americans. He reported to camp every morning about 7:10 and stayed there until nine o'clock at night. [R. 4149.] He took orders from Major Martin. He arranged to get a telephone installed at the camp. He aided the released prisoners of war to get food being dropped from B-29's together with two or three officers in getting medical supplies, food and clothing around the area to the Americans, and to be sure that the Japanese civilians in the area would not steal them. [R. 4150.] He went to Port Maizuru, a Japanese Naval Port, to interpret to Japanese families where some supplies had been dropped on some houses and made a big hole in the home. [R. 4151.]

He went with Major Martin and Lt. Thompson to the Police Station at Miazū (four or five miles from the camp and factory) to set up a prophylactic station for the prisoners of war who had started sight-seeing with Japanese girls, and in order that the prisoners of war could use the station as a prophylactic station. [R. 4152.] A

group of American officers had a big lunch at one of the big Japanese hotels, located on the shore (eight to fifteen officers were present) and they took Kawakita along to act as their interpreter and guide. [R. 4152-4153.] He took the men on an excursion trip and sight-seeing of the sceneries of Japan. [R. 4153.]

When the Americans got ready to leave, the defendant, Kawakita, and Major Martin went to see the Station Master to arrange a train, so many cars, so many coaches, so many baggage cars, for the freight to be taken to the destination. He arranged two different groups. [R. 4154.] Four different coaches. He assisted the men in getting off on September 9, 1945. He was the only interpreter at the station and went to the station for that particular work. He helped load all the things that the prisoners of war wanted to take and the supplies on the trucks. [R. 4154, 4155.] He saw them leave about 10:30 in the morning, greeted them farewell.

After the Americans took over, they beat up at least one Japanese guard in revenge. No one at any time attempted to strike or beat Kawakita. No one at any time ever interrogated him, or charged in Japan that he had committed any acts of treason. [R. 4155.] Title 18, Section 3 (1946 Edition) makes it the duty of any one who has knowledge of another having committed treason to report it immediately or himself be guilty of misprision of treason.

The Japanese lieutenant, Hazama, in charge of the camp and various other Japanese personnel were taken into custody shortly thereafter, but the defendant was not taken into custody. He remained in Japan and in November of 1945, went to work with the Wakasa Kogyo Kubushiki

Kaisha. [R. 4155.] This was an export and import company. [R. 4156.]

In December, 1945, the defendant went to the American Consul in Japan and asked if he could reinstate his American citizenship, or not. [R. 4156.] He told the Consul that he had his name entered in the family Koseki. This is corroborated by the document of the American Consul itself. The defendant told the Clerk at the American Consulate about it and he was informed that that did not affect him because he was a "dual citizen." "You are a dual national," she stated. [R. 4157.] Up to that time, he had not believed he was a dual national, but a Japanese national.

At all times after entering his name in the family Koseki, the defendant believed that he had *only* Japanese nationality. [R. 4197.] After he explained to the clerk of the American Consulate he had his name entered in the family Koseki and he showed her his family Koseki, she said: "You have dual nationality" and she told him that he would be thoroughly investigated by the counter intelligence corps of the army of the General Headquarters and if he was reinstated the Consul will notify him. [R. 4157.] He told her he had been working as an interpreter of the Kogyo Wakasa Kogyo Kabushiki Kaisha and he was listed as a clerk. [R. 4158.] She typed up an affidavit, which he signed. It was about the first part of February, 1946, that he received the letter that his status as an American was reinstated and that he was thoroughly investigated through the Counter Intelligence Corps of the General Headquarters. [R. 4159.] The lady at the Consulate did all of the typing. [See Exhibits 2(a) to 2(i), incl.]

The American Consulate made a finding of *dual nationality* and after two months of investigation made its conclusion and finding after he had been screened by the Counter Intelligence Corps and investigated by them.² [R. 4171.]

"In the opinion of this office, he has not actively collaborated with the enemy, nor engaged in activities inimical to the best interest of the U. S. beyond the minimum necessary to earn a livelihood. A check of the records of the U. S. Army C. I. C.³ in Japan reveals no adverse information concerning him." [R. 4174, Exhibit 2F.]

He thereafter awaited an opportunity to return to the United States. He visited Army Headquarters at least twenty times and visited the American Consulate an equal number of times. [R. 4177 *et seq.*] Transportation funds were arranged for him in the United States sometime in June. In the meantime he had remained in Japan, constantly reporting to the Consulate and to the Army. No effort was ever made to arrest him, or otherwise to charge him with any offense, either of war crimes or treason.

The Consulate made a finding that the defendant "has presented evidence deemed satisfactory to overcome the presumption of expatriation," *as of the date of the finding thereof in 1946*. A passport was authorized to extend to December 31, 1947. The document was signed Meredith

²The American consulate has the power to arrest and even try Americans abroad. Military tribunals were also operating in Japan under General Douglas MacArthur.

³C. I. C. is Counter Intelligence Corps. Sgt. Montgomery at the camp was a member of the Counter Intelligence Corps.

Weatherby, American Consul in Japan. [R. 4175.] The passport to return to the United States was issued June 20, 1946. [R. 4178.] *On the day before that* [R. 4177] *the defendant put in an application with the Japanese Government to divest himself of Japanese nationality.* [R. 4177.]

Thereafter he returned to the United States. He went to live with his father at Los Angeles, California. He went to the University of Southern California, where he attended classes with a number of G. I.'s including one who had been a prisoner of war.

Thereafter, while he was in Sears Roebuck and Company in Los Angeles, California, in September, 1946, a former prisoner of war named William Bruce, and deeply affected by his war experiences, bumped into him—not literally but actually—in the Los Angeles store. Kawakita, so he said, had stopped him from eating a Japanese nut and had interrupted his smoking. [R. 2760-2767.] So upon seeing Kawakita, whom he recognized as one of his former guards in Japan, he told his wife that he had just seen someone he wanted to kill. [R. 2773.] His wife, he said, told him he had gone crazy. [R. 2773.] He followed the defendant out of the store and got the automobile license number of the car. This was when “treason” as far as Kawakita was concerned was “born.”⁴

Thereafter, Bruce reported the matter of seeing one of his Japanese guards to the Veteran's Administration and

⁴Bruce was not a witness to a single overt act of treason found by the jury against the defendant. His testimony regarding refusing to let him eat a nut or smoke (and for which he wanted to kill Kawakita) was admitted on the theory of intent [R. 2756]. Smoking without authority was forbidden by Article 8, page 22, Rules of Prisoner of War Camps [Ex. CS] to prevent fire hazards.

the Government and an investigation commenced of Kawakita being in the United States. [R. 2774.]

No one accused Kawakita of treason even then, not even Bruce and furthermore no arrest or accusation was made of him from that date for almost a year thereafter, to-wit, in June, 1947. Bruce did not even know the correct pronunciation of the defendant's name. [R. 2779.]

Kawakita was arrested by F.B.I. Agent Jerry Sawtelle at the home of his father in Los Angeles. There was no warrant for his arrest and he was not informed of the charge on which he was being arrested. He did not know why he was taken to the commissioner's office, where for the first time a Commissioner's warrant was issued against him on information and belief sworn to by Jerry Sawtelle. While the complaint sets forth an alleged charge of treason, it does not set forth any basis of knowledge of the F.B.I. Agent, who was never shown to have been outside of the United States.

After being held by the F.B.I. for more than two hours, Kawakita was arraigned before the magistrate, on the complaint sworn to by F.B.I. Investigator Jerry Sawtelle, who never claims to have been in Japan, or to have actually had any personal knowledge of any of the transactions.

Thereafter, Kawakita was indicted by the Grand Jury in an indictment which charged overt acts (a) to (i) as they are in the present indictment. Objections to the jurisdiction of the court and to denial of the right to speedy trial in Japan, where the witnesses of defendant were available were denied. [R. 36, Tr. of June 27, 1947.]

Motions to dismiss the indictment because Kawakita had not been lawfully arrested on probable cause, and because the facts alleged in the indictment could not and did not

constitute treason in the setting where alleged and that jurisdiction was lacking [R. 36-38], were argued and denied by the trial court. A demand was made for the inspection of the grand jury minutes to determine if there were facts set out in those minutes. Up to the time that Kawakita was brought before the United States Commissioner, on June 5, 1947, he had not been told or questioned by anybody in the world regarding any alleged charge of treason. [R. 4274.]

The defendant demanded the right to inspect the minutes of the Grand Jury to see if any competent testimony had been presented before them on which to base an indictment—that is to say, whether there had been a single competent witness before the Grand Jury to any alleged overt act of treason. The motion to interrogate the foreman of the jury with questions propounded of the foreman of the jury, were not permitted and objections thereto by the government were sustained by the trial court. [R. 39 *et seq.*]

When a second and superseding indictment returned adding overt acts L, M, N, and O to the indictment, the motions were renewed and efforts were again made to determine if there was any competent evidence before the Grand Jury, or whether the same evidence was considered in returning the superseding indictment, and these efforts were also blocked by the trial court, and motions to dismiss were denied.

All argument theretofore made, on the first indictment, were incorporated by reference and considered by the trial court on the motions to dismiss the superseding indictment.

The trial commenced on June 18, 1948. Twelve jurors and two alternates were selected. Objections were made to having two alternate jurors present, as in violation of

the Constitutional right of trial by jury as that term is understood in the Seventh Amendment to the Constitution of the United States, and to have such alternate jurors present at all times with the twelve regular jurors. The challenge to the alternate jurors and the motion to discharge them was denied by the trial court.

Thereafter commenced a parade of ex-war veterans, many of whom had suffered deeply from their war experiences, and secured shock treatment in hospitals after the war and had been treated for war psychosis. Some of these men are still in the service, and all of them received promotions after their war experiences; they depicted their conditions of labor and alleged punishments received by them from time to time. In each instance the punishment was for an alleged infraction of the rules of the camp or the failure to perform work required in the mine, or in other disciplinary matters, or for actual acts and crimes against the laws of Japan and regulations for the government of prisoners of war in P. O. W. camps established pursuant to treaties between the United States and Japan. [Exs. CS., CT. to CW., R. 227-238; 205-8.]

Thereafter the trial continued to September 2, 1948.

The government conceded that Kawakita was at all times covered by the indictment a citizen of Japan, residing in Japan and drafted to work by the government of Japan in Oyama, Japan.

By reason of the Nationality Act of 1940, Subd. a, b, c, d, Section 402 (U. S. C. Section 802) he was presumptively and actually expatriated—that is, presumptively a *non-citizen*, of the United States.

Not a single specific act showing intent to betray was presented, only isolated statements of expressions, discon-

nected with any overt acts, and designed to influence passions and prejudices, were permitted to be introduced into evidence.

After retiring to deliberate, the jury pondered four days in the summer heat, then requested to be discharged. The court sent them out for further deliberation and declined a motion to discharge them. The foreman of the jury became ill with nervous exhaustion and a doctor had to be called. The defense was not informed of that fact. Six days of deliberation produced a request from four of the jurors for discharge. The foreman pleaded to be discharged; all to no avail. Jurors stated that they had considered every phase of the case and were unable to agree. Again the court refused to dismiss them. The foreman of the jury twice asked for dismissal. Juror Clancy said "everything" had crept into the jury room and it was evident that feeling ran high. The foreman did not wish to sit with other jurors in the bus, for fear of hitting one of them. The judge ordered the jurors to return to the jury room. Mrs. Zeigler, a juror, said she did not feel like returning, but was compelled to do so. The judge, over objections, gave new and further instructions, telling them it was their *duty* to agree and that the minority should listen to the majority.

The jurors separated some of the time while not in the deliberating room. Doctors were called to attend the jurors during deliberation—without knowledge or notice to the defendant or his counsel.

Two and a half more days in a hot and ill-ventilated jury room produced a verdict as to some of the overt acts. Others were not withdrawn, but were not decided.

The judge declined to poll the jurors as to which two witnesses they thought established the overt acts and declined to send them back to decide the undecided overt acts and the government did not withdraw them.

The trial judge imposed the extreme sentence of death to the defendant for the eight overt acts—five of them for allegedly assisting the military in summary punishments—two for burglary, and thefts, and destruction of Japanese government property, another for being made to carry two buckets of paint instead of one, two others because they were disciplined to run around a compound a few extra times, and another who was injured and not moved back to the camp for a few hours when no transportation was shown to be available.

All motions for a judgment of acquittal and for a new trial were denied.

SPECIFICATION OF THE ASSIGNED ERRORS.

I.

The Evidence Is Insufficient to Support the Verdicts.
The Verdicts Are Contrary to the Law and the
Evidence.

CITIZENSHIP AND THE QUESTION OF ALLEGIANCE.

- (a) The Evidence Is Undisputed and the Court Instructed the Jury That Kawakita Was a Japanese Citizen at All Times, Owing Allegiance to Japan.

He was a Japanese citizen, residing in Japan and as such owed *one hundred percent* allegiance to Japan. His duty of allegiance at the time therefore had to be measured by Japanese law, not American law.

- (b) By Operation of American Law, To-wit: the United States Nationality Law of 1940, He Was Presumptively Expatriated—That Is, He Was Presumptively Not a Citizen of the United States* During the Entire Period of Time Specified in the Indictment. Therefore, He Could Not Be Guilty of Treason as a Matter of Law.

- (c) He Owed No Allegiance to the United States in the Setting of This Case and Under the Conditions of This Case.

Title 18, Section One, is applicable only as to persons who *owe allegiance to the United States*.

*The forms of the State Department use the expression "Presumption of Noncitizenship" in respect to one presumptively expatriated. It is Form 213—Foreign Service. See Exhibit 2F.

The Fourteenth Amendment, by reason of which Kawakita became a citizen at birth, applies citizenship only to persons of whom the United States has jurisdiction. Kawakita being a citizen of Japan, and not within the jurisdiction of the United States, was not one owing allegiance to the United States.

(d) Even if the First Two Contentions Are Not Sustained, He Must Be Deemed to Have Elected Japanese Nationality Either Under the Terms of the Nationality Act of 1940 or by His Acts and Conduct, and as Such Was Actually Expatriated as a Citizen of the United States During the Time Mentioned in the Indictment.

(e) Kawakita Lost His Nationality by His Own Voluntary Election:

- A. By remaining in Japan more than two years. (Title 8 U. S. C. 801a.)
- B. By reaffirming his allegiance through a formal declaration in his family Koseki to Japan. (Sec. 801b.)
- C. Accepting a position as an interpreter for military personnel of the Government of Japan and in connection with prisoners of war. (Subdivision (c), Title 8, U. S. C. 801.)
- D. By performing the duties of interpreter under the Government of Japan in a military area while having Japanese nationality and for which only Japanese nationals were eligible. (Sec. 801d.)

E. Using a passport of a foreign state as a national thereof Kawakita went to China on a Japanese passport in July of 1944 and returned in October, 1944. To travel on a Japanese passport it was of course necessary to take a formal oath or affirm his allegiance to Japan and he traveled under its protection.

(f) Venue Was Lacking. Upon Its Conquest Japan Became a District of the United States, Where Kawakita Was "Found."

II.

Treason Was Not and Could Not Be Established as a Matter of Law in the Prisoner of War Camp in Japan, Operating Pursuant to Treaty With the United States and Under the Laws of Japan and Prisoner of War Regulations by Japan Regarding the Conduct of That Camp.

(a) The Camp Was Under the Control of the Military Authorities of Japan and It Was Conceded in the Trial That the Military Authorities Directed and Commanded the Camp, and All Its Activities. The Americans Were a Disarmed Labor Battalion, Employed and Paid Under International Law. There Could Be No Treason in Any of the Acts Showed in This Setting.

(b) There Was No Evidence Throughout the Entire Case of Any Intent to Betray, by Means of the Overt Acts, or in Any Other Way.

(c) The Acts Charged and Found by the Jury Were in and of Themselves Trivial and Inconsequential in Relation to the Charge of Treason, and in No Wise Consisted in Delivering Up the United States to Its Enemy. They at No Time Were in Furtherance of Treason or Betrayal of the United States.

- (d) There Was No Aid and Comfort to the Government of Japan. The Alleged Acts Did Not Help Japan Win the War nor Help to Cause the United States to Lose the War.
- (e) The Proof Was Insufficient to Establish Any of the Overt Acts by the Testimony of Two Witnesses in the Whole of the Overt Act. The Times, Places and Occurrences, Were Uncertain and Indefinite and Did Not Measure Up to the Constitutionally Required Standard.
- (f) There Was No Proof of Continuous Treasonable Conduct as Alleged in Paragraph III, Page 2 of the Indictment.
- (g) There Was No Proof of Paragraph IV of the Indictment That Kawakita, Compelled Members of the Armed Forces of the United States, Who Were Then and There Held by the Japanese Government as Prisoners of War, to Perform Labor at Said Open Pit or Mine and Smelter; or That He Directed and Assisted the Japanese Military Forces in the Imposition of Discipline and Punishment on Members of the Armed Forces of the United States. The Proof Was to the Contrary.
- (h) There Was No Proof of Any Acts in Furtherance of an Intent to Betray. The Evidence Is Uncontradicted That Kawakita by His Acts and Conduct at All Times Thought He Was Solely a Japanese Citizen Owing 100% Allegiance to Japan. The American Statute Presumptively Expatriating Him Making Him a Non-citizen and American Regulations Informing Him That His Paramount Allegiance Was to Japan Entitled Him to This Belief and Estops the United States From Claiming Any Loyalty or Attributing Treasonous Intent to Him.

III.

The Court Erred in the Admission and Exclusion of Evidence in the Trial of the Case.

- (a) The Trial Judge Admitted, Erroneously, Over the Objections of the Defendant, Isolated Acts, Distorted and Disconnected Acts or Statements to Show "Intent" to Betray. This Was Error. [See Appendix.]
- (b) The Trial Judge Erred in Excluding the Deposition of Mayor Sugimoto [Ex. CO].

IV.

The Court Erred in Other Rulings in the Case.

- (a) The Court Erred in Its Interpretation of the Nationality Act of 1940, in Holding That These Were the Only Methods by Which the Natural Right of Expatriation Might Be Expressed and in Holding That Section 808 of the Nationality Act, Inherently and Construed and Applied, Was Not Unconstitutional.
- (b) The Court Erred in Failing to Grant the Judgments of Acquittal at the Close of the Government's Case and at the Close of the Defendant's Case.

V.

The Court Erred in the Instructions Given and Refused.

- (1) The Court Erred in Its Instructions Regarding the Rights and Duties of a Dual Japanese and Presumptively Expatriated American Citizen Residing in Japan, One of Its Citizenship.

- (2) The Court Erred in Holding and Instructing the Jury That a Dual Citizen Residing in Japan at a Time When He Was Presumptively Expatriated From the United States, Did Not Owe One Hundred Percent Allegiance in Japan to the Japanese Government, and That He at That Time Owed Allegiance to the United States.
- (3) The Court Erred in Its Instructions Limiting the Ways in Which Expatriation May Be Effected.

The Court Erred in Instructions Refused.

VI.

The Procedure Followed During the Deliberation of the Jury Violated Appellant's Right to Fair Trial Guaranteed by the Fifth Amendment to the United States Constitution.

- (a) The Court Erred in Compelling the Jury to Continue Deliberating for Eight Days and Thus Coercing the Verdict, After a Jury Had Twice Requested to Be Discharged, and the Court Told the Jury It Was Its Duty to Return a Unanimous Verdict.
- (b) Jurors Were Ill and Were Visited by a Doctor Without the Knowledge or Consent of the Defendant or His Counsel, or Without Being Informed at Any Time During the Deliberations. The Orders Permitting Doctors to Visit and Attend Jurors Were Made Outside the Presence of the Defendant and His Counsel. They Were at No Time Informed. This Deprived the Defendant of the Right to Be Personally Present at Every Stage of the Proceedings (Rule 43, Rules of Criminal Procedure), and Deprived Him of Rights Guaranteed by the Fifth Amendment to the United States Constitution, and to Trial by Jury Guaranteed by the Sixth and Seventh Amendments to the United States Constitution.
- (c) The Jury Separated, Without Leave of Court, During the Eight Day Period Above Referred to.

VII.

The Court Erred in the Instructions to the Jury Given Six Days After Retirement and When the Jury Had Failed to Agree After Reporting That It Had Considered Every Phase of the Case and Was Unable to Agree. The Court's Instructions That the Minority Should Listen to the Majority and That It Was Their Duty to Return a Unanimous Verdict Were Prejudicially Erroneous.

VIII.

The Court Failed to Exercise Discretion in Imposing the Death Sentence and in Inferentially Criticizing Other Courts and the Executive for Not Inflicting the Death Penalty in Treason Cases.

IX.

The Trial Court Committed Several Procedural Errors in the Trial of the Case.

Specification of Procedural Errors in the Case.

(a) The trial court erred in failing to dismiss the indictment for failure to state an offense against the laws of the United States.

(b) The trial court erred in refusing to permit the defendant to inspect the minutes of the Grand Jury to determine if it proceeded upon legally competent evidence.

(c) The trial court erred in denying certain features requested in a Bill of Particulars and in limiting the scope and extent of the Bill of Particulars in permitting amendments to the Bill of Particulars during the trial.

(d) The trial court erred in holding that the defendant had not been denied a speedy trial while in Japan. If he had committed treason it was the duty of those who knew it to accuse him promptly. (Title 18, Section 3 (1946 Edition.)

(e) The trial court erred in refusing to permit testimony to be taken from the Foreman of the Grand Jury as to the composition of the Grand Jury, as to the number of witnesses to each overt act.

(f) The trial court erred in holding that jurisdiction was in the United States—Los Angeles, California—and not in Japan where the United States had occupied Japan and had military government.

(g) The trial court erred in refusing to discharge the two alternate jurors and in holding that a jury of fourteen instead of twelve may sit in a treason case, and that this is a common law jury.

(h) The trial court erred in permitting the jury to separate, illegally, after its retirement.

(i) Outsiders were permitted to contact the jurors during their deliberations, without the defendant or his counsel being informed at any time during the trial, or his consent or approval being received. These included three different doctors at two different times. This deprived the defendant of due process of law guaranteed by the Fifth Amendment and violated Rule 43 entitling him to be present and informed at every stage of the proceedings. Illness of one or more of the jurors was such a fact as should be promptly communicated to counsel and the accused and they should be informed in open court.

(j) The trial court erred in the length and manner of deliberation which it held the jury and in telling them it was their duty to agree when it had become evident they could not do so unless some of them surrendered their conscientious convictions—which was coercion of the jury.

(k) The trial court erred in refusing to dismiss the jury on several requests to be discharged.

(l) The trial court erred in failing to retain the jury for further decisions one way or the other on the five remaining acts, in the indictment having submitted special findings to the jury and the jury having disagreed as to the same, the result was a disagreed jury.

(m) The trial judge erred in refusing to poll the jurors as to which overt act or acts and as to which witnesses the jurors thought established the overt act.

(n) The trial court erred in refusing to send a definition to the jury—giving the definition of the word “betray” after it had requested such a definition, except one that came from a desk book dictionary that was entirely inadequate.

(o) The trial court erred in discharging the jury without a unanimous finding on each of the special verdicts submitted to it.

(p) The trial judge erred in failing to submit the issue of punishment to the jury. Such punishment lay in the discretion of the jury and not the judge and was an issue to be found by the jury.

(q) The motions in arrest of judgment should have been granted. The motion for judgment of acquittal should have been granted.

(r) The sentence of death was arbitrary and capricious and unwarranted.

Summary of Argument.

I.

Tomoya Kawakita was, at all times mentioned in this indictment, a Japanese citizen within the jurisdiction of the then Japanese nation. The court instructed the jury "according to the law of Japan, the defendant himself by reason of his Japanese parentage was from birth a Japanese National or subject, owing allegiance to Japan." [R. 5504.] He was then residing in Japan and had resided in Japan for five years. Therefore, under the terms of the Nationality Act of 1940, he was presumptively expatriated from his American citizenship and owed 100 per cent allegiance to Japan and no allegiance to the Government of the United States during the entire time covered by the indictment. A presumption of expatriation is a presumption of non-citizenship.

Section I of Title 18 (1946 Edition) provides that the crime of treason applies only to persons "owing allegiance to the United States. The section reads:

"Section 1. (Criminal Code, section 1.) *Treason.* Whoever, *owing allegiance to the United States*, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason. (R. S. Sec. 5331; Mar. 4, 1909, c. 321, Sec. 1, 35 Stat. 1088.)"

The Fourteenth Amendment to the Constitution of the United States provides as follows:

"All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside."

The presumption of expatriation removes Kawakita from the jurisdiction of the United States during the period of presumptive expatriation.

Kawakita, being a dual citizen, owed 100% allegiance to the country in which he was residing and whose protection he was receiving. He owed no allegiance to the United States, which had by Statute and Regulation presumptively expatriated him—presumed him to be a non-citizen—and had not afforded him any protection nor accorded him any of the mutual obligations of citizenship. Nor was he during that time within the jurisdiction of the United States.

A Japanese subject, born in the United States of Japanese parents, whose parents were born in Japan and are Issei, and who by reason of that fact has Japanese citizenship, and who is thereafter drafted to work in a prisoner of war camp by the Japanese Government while thus residing in that country, cannot be guilty of treason to the United States any more than if he was drafted into the shooting forces and killed our soldiers. He is, by the laws of that country, a part of the enemy and is bound to a hundred per cent loyalty to that government while residing in that country and while drafted to work for that country, or to fight for that country in war. If he resided in the United States and was drafted by the United States Government either to fight for it or work for it he would owe the United States 100% allegiance during that time.

The Government of the United States has recognized dual citizenship, and through its Political Branch the State Department has set up its policy of dual citizenship, and the courts are bound by that holding.

By the principles of that doctrine an American with dual citizenship must legally expect and realize and believe that he becomes *presumptively* expatriated from his American citizenship if he resides in the other country six months or longer, and that his obligations to the United States ceases after that time and that the obligations of the United States to protect him ceased during that time.

The Government of the United States, by reason of its announced political policy toward dual citizens, is estopped to charge such a one with treason when he gives his paramount allegiance to the country in which he is residing and whose citizenship he admittedly possesses, and where this country, by its own laws presumes him to be a non-citizen of the United States. The policy of the State Department is entitled to great or controlling weight.

Mexico v. Hoffman, 324 U. S. 30, 38, 42;

Perkins v. Elg, 307 U. S. 325;

United States v. Johnson, 124 U. S. 236, 31 L. Ed. 389;

Reid v. United States, 73 F. 2d 153, 156 (C. C. A. 9).

Tomoya Kawakita was a Japanese subject, born in the United States of Japanese parents, whose parents were born in Japan, and whose parents are Issei by reason of that fact had Japanese citizenship. While residing in Japan when the war broke out he was drafted as a Japanese subject and compelled to work in a Japanese prisoner of war camp by the Japanese government. He could not be guilty of treason to the United States, since he was by our law a part of the enemy and was bound to 100 per cent

loyalty to that government as one of its citizens residing in that country. The Government of the United States recognized dual citizenship.

Under the doctrine of dual citizenship, such dual citizens owed his paramount allegiance to the Japanese government and as such was bound to obey the orders of the Japanese government and owed that government a hundred per cent loyalty while in that country in return for the protection that it gave to him as a citizen of that country. This protection consisted in the unmolested right to go about as he pleased, to live there, to eat its rationed and scarce food, and to be protected by its military forces as far as they were able to do so against outside territorial attack upon its sovereignty, just the same as Japanese subjects residing in the United States and holding dual citizenship owed one hundred per cent loyalty to the United States while in this country and were bound by its laws and regulations, including being subject to the draft or punished for evading it. Kawakita was such a dual citizen, residing in Japan. Moreover he was presumptively expatriated from the United States because of his dual citizenship and acts, under the Nationality Act of 1940.

II.

The petty acts charged in this case on which the jury made findings did not and could not rise to the dignity of treason nor in their setting constitute acts of treason nor in furtherance of any treason, nor treasonable designs, even assuming a possible contingent allegiance owing to the United States from the defendant if he returned to the United States.

III.

All of the alleged acts were committed in connection with prisoners of war, who were a labor battalion within the confines of Japan and were governed by international treaty and therefore subject only to the laws of Japan. Two of the alleged acts constituted minor acts of alleged assault for not performing the required quota of work required by the camp authorities, under International and Japanese law. A third consisted in the failure of returning a person injured while at work to the camp prisoner of war hospital supervised by an American prisoner of war doctor as promptly as he thought he should be returned. The other five acts alleged consisted of aiding the military in punishments for committing the serious offenses of theft of scarcely rationed food products, which deprived other prisoners of war of the like quantity of food products. Discipline to prevent thefts was necessary to protect other American prisoners of war and was of benefit to them. [See Testimony of Capt. C. M. Bleich, American prisoner of war doctor in charge, in Appendix.]

Beatings were administered by both American and British prisoners of war to other prisoners as punishment for their violation, without constituting treason.

American Sgt. Montgomery admitted he administered beatings himself for thefts. [R. 248.]

General Patton slapped an American soldier in Italy without being punished for treason—in fact without being punished.

The Japanese punished their own people by striking or beating them. [R. 4026, 4029.]

IV.

The conduct of the prisoners of war camps in Japan were governed by the Hague Convention, to which Japan agreed *mutatis mutandis* to be governed through International agreement with the Swiss and American governments. Under this treaty the prisoners were *in the power of Japan* and were subject to all the laws, rules and regulations of the Japanese Government as well as the Japanese prisoners of war camp rules and regulations having the force of Japanese law.

Such punishments within Japan therefore could not and did not constitute treason, whether carried out by an American subordinate in the camp, or whether carried out by a Japanese-National who had American citizenship by reason of his birth in the United States, and who had resided in Japan for more than five years.

Under local law and pursuant to treaty, the Americans could have been given the death penalty for their acts of theft. Summary punishment was administered instead and probably saved more severe penalties.

V.

The presumption of expatriation contained in Sections 401 (a) (b) (c) (d) and 402 of the Nationality Act (Title 8 U. S. C. 801 and 802) applied to the appellant, who had lived in Japan more than two years—(five years)—and whose passport had expired and had not been renewed, and who had given his residence as Japan. Such presumption of expatriation existed at all times during the period covered by the overt acts charged in the indictment. Even if such presumption was overcome by the appellant at and as of a later date to the satisfaction of

the American Consul, it did not relate back to the time when the presumption prevailed. 54 Stat. 1169; 8 U. S. C. 802 and State Department Passport Regulations 315.9 so state.

VI.

The evidence is entirely insufficient to prove treason. There is utterly lacking any proof of any treasonable intent; that is, to commit any of the acts alleged with intent to *betray* the United States of America.

An intent to betray is a specific intent requiring specific proof of intention to deliver America into the hands of the enemy. It has to make the enemy stronger or America weaker. The acts found could not and did not do either. Sometimes the overt acts themselves establish such intent, as where one delivers military secrets to an opposing government, such as General Benedict Arnold did to the British Government. But, where the acts are in and of themselves of an innocent nature consisting, as here, merely of alleged simple assaults or assistance of the military in carrying out military punishments for serious crimes, the proof of the specific intent must be clear and convincing beyond a reasonable doubt and to a moral certainty. No such proof existed in this entire record.

The mere alleged statement of the defendant regarding General MacArthur, by telling prisoners of war to hurry up, to do more work, or to send fewer crews to the carrying of a log, or to run around a military compound a little faster, and that he did not like the United States, did not show any treasonable intent—either by themselves, separately, or in their setting—as required by *Cramer v. United States*, 325 U. S. 1.

VII.

There was no proof that any of the acts committed gave any aid or comfort to Japan. The Government of Japan certainly would not cite Kawakita or give him a decoration or an "E" for giving it any aid or comfort in any of these acts, nor would we find Tojo or the Emperor glorying in any of them as giving the Government of Japan aid and comfort. They never heard of Kawakita during any of the time of this case; neither did Kawakita's employers. Treason required knowledge and co-operation by the organized Government of Japan and its authorized agents acting toward the treasonable purpose and design. This essential element was lacking.

VIII.

As far as giving "aid and comfort" to the Government of Japan is concerned, the very recitation of the acts alleged reduce this formula to a ridiculous conclusion. If anything, the acts on their face would tend rather to aid the rest of the prisoners of war, since one man shirking his job by doing less work imposes burdens on other men to do the work that was required under the work requirement. Also, stealing scarce food deprived the other prisoners of war of their proportionate portion of the articles. The American prisoner of war doctor had for medical reasons forbidden the prisoners from stealing and eating vegetables.

IX.

The acts thus lack any inherent quality of any treasonable character.

X.

The proof is that the defendant did not adhere to the enemy. He *was* the enemy within the meaning of International Law, the Law of Nations and our own court decisions thereon. There is a distinction between being the enemy itself and being apart from the enemy and *adhering* to it, giving it aid and comfort.

XI.

The Japanese Government had drafted Kawakita as one of its subjects, owing loyalty to it. Had he disobeyed he would have been guilty of treason to Japan.

XII.

The defendant had expatriated himself under the provisions of the Nationality Act of 1940. He had elected Japanese citizenship. He had reaffirmed his allegiance to the Government of Japan. Such a reaffirmance constituted an *affirmation* within the meaning of the Nationality Act. Japan so construed his acts, and drafted him as one of its Nationals.

He had also taken an oath of allegiance to Japan and had engaged in employment in which only Japanese Nationals were eligible, in a company which had been drafted by the Japanese Government and was therefore controlled by it and a part of the Government of Japan.

XIII.

The Court below misconstrued the Nationality Act as being the sole way of losing one's nationality or expatriating ones self.

The International Law and the Law of Nations is equally a part of the Constitution of the United States,

and any way in which one may lose his nationality under International Law is binding on the Government of the United States.

XIV.

Assuming that the defendant did not lose his American Nationality or actually expatriate himself, or that the State Department could make a contrary finding, as a political or administrative determination at a later date, the evidence is uncontradicted that during the entire period covered by this case that the defendant honestly believed himself to be a Japanese National.

XV.

The trial court erred in the admission of a mass of irrelevant evidence which in no way showed treasonable intent. Such evidence should have been stricken, and the jury instructed to disregard it. This was highly prejudicial and inflammatory.

XVI.

The trial court also should have granted the defendant's motion to dismiss the indictment—or entered judgment of acquittal at the close of the government's case and to grant the motion for judgment of acquittal at the end of the defendant's case.

XVII.

The court erred in rejecting the deposition of Ryuzo Sugimoto who gave his interpretation of the Municipal Law regarding one's registering his family name in the Koseki as it applied to the defendant.

The weight of the testimony was for the jury, not for the court.

Summary of Procedural Errors.

(a) At the beginning of the case the appellant sought to question the foreman of the Grand Jury as to whether there were two witnesses before the Grand Jury as to the alleged overt acts. It was error for the trial court to deny this motion for an inspection of the minutes of the Grand Jury.

The constitutional requirement regarding two witnesses applies equally to an indictment as to the evidence in the trial of the case. An indictment should not be returned except upon the best evidence available and in sufficient quantity to warrant the return of an indictment as fundamental as that of the charge of treason.

(b) The trial court erred in overruling the motion of the defendant that he was entitled to a speedy trial in Japan, the status of the alleged acts, where he could get witnesses in his behalf. The defendant, although remaining in Japan almost a year after the alleged occurrences, was not arrested and was cleared by the Army Intelligence of any wrongful activities. Had he done anything wrong, he would have been seized by the American military in Japan and subject to court martial under the Articles of War. Any act of treason subjected him to such seizure and punishment. Also any officer or man who failed to report such treason was guilty of misprision of treason. (Title 18, Section 3.) Military government and military tribunals also were available.

(c) The trial court erred in denying the defendant's motion objecting to alternate jurors, Rule 24, as in violation of the defendant's constitutional rights to a trial as at common law by a jury thus constituted, consisting of

twelve persons, no more, no less, under the Seventh Amendment to the Constitution of the United States.

(d) The jury, after it retired to deliberate, separated without leave of court. They were allowed to run around on different floors in the hotel and visit each other, without restraint or restriction. Some remained in the lobby of the hotel; some went upstairs and they were on the loose. Some were sick and required medical attention without the defense being informed. Doctors secretly visited and treated jurors.

(e) The trial court erred in not discharging the jury after they stated after four days of deliberation that they were unable to agree and had considered every phase of the case.

The court further erred in failing to discharge them after they had continued deliberating for a period of six days and still said they were disagreed and wanted to be discharged, and the foreman and other jurors requested that they be discharged.

A verdict thereafter was a verdict under compulsion and coercion.

(f) The trial court erred in instructing the jury, over the defendant's objection, that it was their duty to reach a unanimous verdict and what constituted a "majority rule" and that the "minority" should listen to the "majority." There are no such duties or rules for jury deliberation for the minority to surrender to the majority.

These are not the rules that apply in criminal cases. Each juror must be satisfied beyond a reasonable doubt and not be changed as to his findings merely because there is a majority on the other side. Nor is there any law anywhere that says it is the jury's duty to reach a unanimous verdict.

The holding out of the jury for a period of eight days in the setting and atmosphere it was in constituted coercion and forced a verdict.

This denied fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

(g) The trial court erred in refusing to instruct the jury fully, as to the meaning of the words "loyalty" and "allegiance" at their request after they had retired to deliberate and had requested the court to give them the actual meaning of these words.

The defendant thereafter tendered an instruction from the unabridged dictionary which the court merely filed and refused to give to the jury.

(h) The trial court failed to poll the jury when they came in with their purported verdict as to the two witnesses that each juror thought established the alleged overt acts.

Since the testimony was very indefinite and vague as to the date and times and persons who saw the various acts, the defendant had a right to have each juror express himself or herself as to the individual overt act and as to the witness he or she thought established it. It was

impossible to tell whether the jurors had really agreed as to which witnesses had in fact established each overt act. This was emphasized by the fact that during the deliberations the jurors returned into court and one of the jurors asked some details about a witness to an overt act, a witness that had not testified at all to the overt act regarding which the juror asked.

(i) The trial judge arbitrarily pronounced the death sentence.

The punishment of death for the reasons given by the trial judge was an abuse of discretion and of the clear intent and purposes of both the framers of the Constitution and of Congress.

The trial court's arbitrary statement critical of other courts and the executive shows that he exercised no discretion whatever and that he believed that in any case a person convicted of treason should suffer the death penalty because a traitor's life isn't worth anything anyhow. An exercise of discretion is required before such penalty is inflicted. The penalty in this case is for the jury to fix.

(j) The trial court erred in the instructions given on citizenship and the duties and obligations of a dual citizen residing in Japan and in refusing others.

(k) The trial court erred in its ruling that one may only be expatriated under the Nationality Act of 1940 and that that act provides the exclusive method of losing American Nationality.

ARGUMENT.

I.

The Evidence Is Insufficient to Support the Verdict.
The Verdict Is Contrary to the Law and the Evidence. The Evidence Is Wholly Lacking to Support the General Verdict or Any of the Special Findings of the Jury, Either as to Citizenship or as to Any Treasonous Acts, or Any of the Essential Elements of Treason. Nor Were There Two Direct Witnesses to Each Overt Act Found by the Jury.

The jury found the appellant guilty of treason on the basis of eight alleged overt acts out of the fifteen charged in the indictment,—thirteen of which were submitted to the jury,—but none of these overt acts so found against appellant, singly or collectively, either proved treason or were in furtherance of treason.

We assert, confidently and most vigorously, that the petty nature of the acts found against appellant did not rise in and of themselves nor in their setting to the dignity of the greatest crime on our federal penal statute, to-wit, Treason.

We assert, vigorously and confidently also, that the crime is *treason*, not the overt acts, and that there is wholly lacking in this case any proof of any *treason* against the United States of America.

Treason requires betrayal of one's country into the hands of the enemy.

Cramer v. United States, 325 U. S. 1.

Treason requires adhering to the enemy, giving them both aid and comfort, neither of which was established.

It thus requires knowledge on the part of the foreign government of the traitorous design, which was entirely absent in this case.

Undoubtedly one cannot be convicted of treason without having performed an act that is traitorous. It must be such an act as, when coupled with evidence of the accused's owing of allegiance to the United States, and a traitorous intent, would warrant the submission of the case to the jury. (*Cramer v. United States*, 325, U. S. 1.) None of the alleged overt acts found by the jury can survive this simple test.

The evidence is further insufficient in this: (1) There is no proof of the specific intent to betray the United States, the first essential element of the crime of treason. (2) There is no proof of giving "aid and comfort" to the enemy—strengthening Japan or weakening the United States in its war effort. (3) There was no proof by two witnesses to each of the whole overt act found.

Tomoya Kawakita, was at the time and under the setting the *enemy itself*. (*In re Territo*, 156 F. 2d 142.) He therefore could neither "adhere" nor give aid or comfort. Nor was Japan, as a nation, in the broad sense in which treason is generally understood, either aided or comforted. The overt acts found neither helped nor strengthened Japan toward winning the war, nor weakened the United States toward losing it.

It is conceded, and the court instructed the jury that he was a Japanese citizen. As such he owed allegiance to

Japan. While in that country it was total allegiance. Therefore, he could in no wise be guilty of treason.

Carlisle v. United States, 16 Wall. 147;

Ex parte Quirin, 317 U. S. 1;

Yamashita v. United States, 327 U. S. 1;

In re Territo (C. C. A. 9), 150 F. 2d 142.

None of the acts, singly or collectively, could be deemed treasonous. None of the Evidence Amounted to the dignity of the high crime of treason. It was merely an attempt to “get” another “Jap” who had been on the other side in the war, and was now living in the United States. Upon his discovery in the United States “Treason” was born as a means of retaliation in the mind of war veterans—one of whom wanted to kill Kawakita on seeing him in this country, because the veteran could not eat a nut or smoke a cigaret while working as a prisoner of war in Japan.

A.

The Burden of Proof Was on the Government to Prove Actual Existing Citizenship in the United States and Actual Duty of Allegiance to the United States at the Time. Two Direct Witnesses Necessary to Prove American Citizenship.

The constitutional requirement of two witnesses is essential to establish treason. Two direct witnesses were necessary to prove that Kawakita was, during the period mentioned in the indictment, actually an American citizen, then owing allegiance to the United States and as such committed overt acts of treason, or delivery of the United States to its enemies.

No such witnesses were produced.

We are not referring here to the matter of Kawakita's original American citizenship by birth and by reason of the operation of the Fourteenth Amendment. That we conceded by stipulation and conceded in the trial. What we did not concede nor admit was that he was an American citizen at the time of these alleged occurrences, nor that he owed at that time an allegiance to the United States. That burden rested upon the Government in order to establish its case. That burden had to be met by two direct witnesses having proof of conduct or matters which would overcome the presumption of expatriation or actual expatriation. Such proof is entirely lacking.

The constitutional expression of "two witnesses to the overt acts" means two witnesses to the overt act *of treason*, which necessarily would include as an element that the accused is actually a citizen of the United States, an essential ingredient of the crime, and actually then *owing allegiance* to the United States at the time.

As essential elements of the treasonable act in this case is necessarily the element of actual, existing American citizenship, and actual, existing duty of allegiance. There must be two direct witnesses to prove this element as of the time of the alleged act. These elements must be proved beyond a reasonable doubt by the Government.

Cramer v. United States, 325 U. S. 1;

Lilienthal v. United States, 97 U. S. 237, 272, 24 L. Ed. 904;

Miller v. United States, 155 U. S. 438;

Davis v. United States, 160 U. S. 469;

Green & Co. v. United States, 74 F. 2d 6.

The whole of the overt act must be proved by two witnesses.

Robinson v. United States, 259 Fed. 685;

Cramer v. United States, 325 U. S. 1;

Haupt v. United States, 330 U. S. 631, 90 L. Ed. 1145.

In this case the question of citizenship and a present existing duty of allegiance to the United States are inseparable from the overt acts, since the overt act must be in furtherance of treason and without the actual existing citizenship in the United States and a duty of allegiance to it being established no overt act is sufficient.

The Government sought to shift this burden to the defendant, by merely proving the defendant's original birth in the United States. On this they rested their entire case regarding his existing American citizenship.. But there is no presumption of continuing citizenship or duty of allegiance to the United States in the setting of this defendant. The presumption is to the contrary as we shall hereinafter set out.

Even if it be contended that actual existing citizenship in the United States and a present existing allegiance to it do not have to be proved by *two* witnesses, they must still be *proved* beyond a reasonable doubt by evidence. This is entirely absent. The proof is to the contrary. The undisputed evidence is that Kawakita resided in Japan for five years, that he had no American passport, that he was a Japanese citizen, that he was working in a Japanese defense plant area as an interpreter under the military authorities of Japan, that he traveled on a Japanese passport to China, that he had expatriated himself by his own

voluntary act in electing Japanese nationality, and that all his acts and conduct reaffirmed an existing allegiance to Japan, and that he then owed a then present duty of allegiance as a citizen of Japan to the government of Japan.

Therefore the Government Failed to Meet the Burden of Proof Beyond a Reasonable Doubt to Establish the Citizenship of Kawakita as Being an Actual American Citizen During the Period Covered by the Indictment, to-Wit, From August, 1944 to August 25, 1945, Owing Allegiance to the United States During This Period.

It was conceded throughout the trial that the defendant could not be guilty of treason if he was not an American citizen owing allegiance to the United States. Therefore, at the outset of its case, the most essential burden of the Government was to prove beyond a reasonable doubt that Kawakita was, during the period mentioned, an American citizen and not either a presumptive non-citizen or an actual expatriate. Also that he had a duty of allegiance to the United States. This it failed to do.

In *Lilienthal v. United States*, 97 U. S. 237, 272, 24 L. Ed. 904, the court said:

“In criminal cases the true rule is that the burden of proof never shifts; that in all cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt of the affirmative of the issue presented in the accusation, that, the defendant is guilty in the manner and form as charged in the indictment. *Comm. v. McKie*, 1 Gray 64; *Com. v. York*, 9 Metc. 125; *Com. v. Webster*, 5 Cush. 305; *Com. v. Eddy*, 7 Gray 584; *Com. v. Wright*, Ben & H. L. Cr. Cas. 399.

Text writers of the highest authority state that there is a distinction between civil and criminal cases in respect to the degree of quantum of evidence necessary to justify the jury in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates; but in criminal trials the party accused is entitled to the legal presumption in favor of innocence, which in doubtful cases, is always sufficient to turn the scale in his favor. 3 Greenl. Ev., 8th ed., sec. 29; 1 Taylor, Ev., 6th ed., 372."

And see:

Brinegan v. United States, 328 U. S. 160, 173, 93 L. Ed. 1879, 1889.

In both August, 1944 and throughout the period to August 25, 1945, Kawakita was covered with two presumptions—one of them was that being a dual-citizen the Congress of the United States had presumptively expatriated him under the Nationality Act of 1940, Section 801, subparagraph (a), (b), (d), (e) and (f). He was also covered with the presumption of innocence.

What was then the effect of the presumptions? They covered the entire period charged in the indictment, to-wit, from August, 1944 until August 25, 1945.

A presumption is evidence which the jury are bound to follow and remains such until or unless it is overcome.⁶ In a criminal case, the Government's proof must be beyond a reasonable doubt.

It was incumbent upon the Government to prove beyond a reasonable doubt prior to the close of the Government's

⁶Section 1961, Code of Civil Procedure of California.

case that the presumption of expatriation had been overcome during the time of the period covered by the indictment.

One may rely upon a presumption for his total defense. Thus, one may rely on the presumption of innocence, and not take the witness stand.

Fifth Amendment U. S. Constitution ;

Bruno v. United States, 308 U. S. 287.

One may also rely on the presumption of expatriation.

The indictment charged that Kawakita was *a citizen* of the United States at the time of the alleged occurrences, not a presumptively expatriated citizen. The statutory presumption and proof was that *he was not a citizen of the United States* at the time of the occurrences, he having *dual citizenship* and residing in the country of his other citizenship, and that by reason of his residence in Japan he was *presumptively expatriated*.

Not a single shred of evidence was offered as to conduct, circumstances, or other things during the period alleged in the indictment that showed Kawakita was then and in fact an actual citizen of the United States or had done anything to continue his citizenship, or was not presumptively expatriated. All of his conduct was to the contrary, which *sustained the presumption* of expatriation rather than overcame it.

He was drafted as a Japanese subject. [Exhibit No. 6-I.] He held a position as interpreter under the Japanese government in a military area. He responded to the draft without protestation or insistence that he being an American citizen he was therefore not liable to the draft. He

was drafted to the prisoner of war camp, a Japanese military area.

If the Government's contention is to be followed, the Government's own charges as well as proof in this case are that he *acted contrary to any claim of American citizenship* and under a belief that he was expatriated. The very acts charged in the indictment negative any claim to American citizenship. He selected a Japanese residence; his desire to have prisoners of war come up to their requirement to do the required amount of work and not sabotage the job or malingering on the job, we believe, would be contrary to any claim of American citizenship.

There is not a single act, thing, or statement in the entire record which would, or could, establish beyond a reasonable doubt, nor at all, any competent or substantial evidence to overcome the presumption of expatriation, during *this period of time*.

"Inferences arising from circumstances cannot be substituted for circumstances to prove guilt."

Gerson v. United States, 25 F. 2d 49.

There is not a single circumstance in the entire evidence regarding this period of time which could be sufficient to overcome the presumption of expatriation.*

*When a presumption exists and is not controverted by substantial evidence, the jury is bound to find in accordance with the presumption.

The Code of Civil Procedure of California gives as good definitions of "presumption" and its effect as exists anywhere. Section 1959 defines presumption as follows:

"A presumption is a deduction which the law expressly directs to be made from particular facts."

Therefore, since there is no other evidence controverting Kawakita's presumption of expatriation as to the actual time of its

See discussion on presumption in *Tot v. United States*, 319 U. S. 467, and cases therein cited.

The presumption contained in the Nationality Code carries with it the necessary thought or connotation that a dual citizen who remains in the country of one of his citizenships has in fact elected and preferred to give that country his loyalty and therefore is actually or presumptively expatriated. (U. S. C. Title 8, Sec. 801a.)

The Government relied in this case upon the fact that in December, 1945, after the war was over, and in February, 1946, the defendant made application to the American Consulate for permission to return to the United States and at that time merely satisfied the United States Consulate officer as an administrator that he then overcame the presumption of expatriation.

Such later act or finding by the United States Consulate officer did not remove the effect of the earlier presumption, nor did it change the facts or the burden of proof upon the part of the Government. In fact this testimony was wholly irrelevant, except for the possible purpose of showing how he came back to the United States, which,

occurrence, the jury was bound to find according to the presumption. This made him innocent of treason.

And, since a person is presumed to know the law, Kawakita must be presumed to have known that he was presumptively expatriated during this period of time; therefore he could not have any treasonable intent since treason is a crime of the mind, in which one intends to betray his own country.

That this thought was in the mind of the jury is evidenced by the fact that the jury asked the judge after it had been out six days for a definition of the word "betray."

too, was not relevant to the issue of whether he was presumptively or actually expatriated.

The United States Consulate found that he had *dual* citizenship. [Ex. 2D.]

This only was a determination by an administrative officer of the state department that he overcame the presumption of expatriation *as of that date and his passport so distinctly states*. (Nationality Regulation 315.9.) It did not have the effect of overcoming the presumption of expatriation during the period covered by the indictment.

We submit, therefore, that this first and most important element was not proved by the Government, namely that during the period of time covered by the indictment Kawa-kita was *an actual American citizen*, owing allegiance to the United States. Rather, the evidence proves affirmatively that he was presumptively or actually expatriated and that he so conducted himself in accordance with that presumption, and as a Japanese citizen, residing in Japan, owing allegiance to Japan. And since he owed 100% allegiance to Japan under his dual citizenship while he was residing in that country it is respectfully submitted that he could under none of the circumstances herein enumerated have been guilty of treason.

B.

The Failure of Proof.

1. The indictment charges, and apparently recognizes, in paragraph I that there are two separate elements relating to citizenship necessary to establish the offense:

(1) That the accused is a *citizen* of the United States, and

(2) That he is a *person owing allegiance* to the United States.

It is appellant's position that one may be a dual citizen under recognized international law and our own decisions and not owe allegiance to a country in which he is not residing and whose protection he does not have and from which by its own laws, he is presumptively expatriated from its citizenship. The indictment charges in the conjunctive that:

"Tomoya Kawakita, the defendant herein, was born at Calexico, California, on September 26, 1921 and he has been at all times herein mentioned, and now is, a citizen of the United States of America *and* a person *owing allegiance to the United States of America.*" (Emphasis ours.)

It is the position of the appellant: (1) that Kawakita being a dual citizen, residing in Japan, was a citizen of Japan *owing allegiance to Japan* during such residence and that he was *presumptively expatriated as a citizen of the United States* and therefore, at the time that his American citizenship was presumptively lost, that he was *not* "a person owing allegiance to the United States of America" (2) Since our State Department recognized dual citizenship, throughout the entire period, in its treaty and

other relationships with Japan and other countries where dual citizenship exists, and since by Statute such a dual citizen is *presumptively expatriated after six months residence in the other country*, that is, that he is presumptively a noncitizen of the United States, there was a failure of proof that Kawakita was during all times mentioned herein, either a citizen or that he was "a person *owing allegiance* to the United States of America." (3) And, the Court having instructed the jury, and the Government having conceded that the defendant was a *citizen* of Japan during all times mentioned herein, the charge of treason could therefore not lie, since during that residence in Japan, he owed one hundred per cent allegiance to Japan, as a citizen of that country and none to the United States which had presumptively expatriated him.

In re Territo, 156 F. 2d 142 (9th Circuit);

Ex Parte Quirin, 317 U. S. 1, 87 L. Ed. 3;

Juragua Iron Company v. United States, 212 U. S. 297;

Carlisle v. United States, 16 Wall. 147.

Perkins v. Elg, 307 U. S. 325;

Savorgnan v. United States, 94 L. Ed. (Adv.) 203.

It is, further, the position of the appellant that by the laws of the United States he was presumptively expatriated and therefore was presumptively a *noncitizen* of the United States during the entire period of time mentioned herein. It was by operation of law.

This presumption, when overcome, is only overcome as of the date of overcoming it.

Section 402 Nationality Code U. S. C., Title 8, Sec. 802;

Section 315.9 Nationality Regulations.

It is further the position of the appellant that by his acts and conduct in Japan he was actually expatriated by operation of the Nationality Act of 1940, having Japanese citizenship, and having reaffirmed his allegiance to Japan, having served in a military area under the armed forces of Japan, and having held a post under the government of Japan.³ We will elaborate later under the heading "the Citizenship of Appellant."

* * * * *

2. Paragraph II of the Indictment charged that "during the times referred to herein, the work and services of prisoners of war who were members of the Armed Forces of the United States, and who were imprisoned at Camp Oeyama were used and utilized," etc.

³The Government of the United States admitted Kawakita's Japanese citizenship during the trial. The Government recognized and therefore stipulated that the defendant had so-called dual citizenship. Such a recognition and stipulation are acceptance on the part of the Government, of the defense that the defendant was a Japanese citizen and as a necessary corollary that he therefore owed total allegiance to Japan during the period specified in the indictment. Under such circumstances, the Government cannot prosecute the defendant by reason of the Doctrine of Estoppel.

It was prerequisite to the Government case for the Government to prove: (1) that the defendant was not a Japanese owing total allegiance to Japan during said period; and that he was still an American whose citizenship the United States Government had not presumptively or actually expatriated. Proving that he did not renounce his American citizenship is not enough under the circumstances. As the court said in his instruction to the jury, an American citizen cannot owe allegiance to more than one country at any given time. If the defendant were a Japanese owing allegiance to Japan at any time during said period, then and in that event he could not be an American owing allegiance to the United States during the period.

Tomoya Kawakita was a Japanese citizen during the period specified in the indictment.

The trial court ruled several times during the trial that Tomoya Kawakita could not obtain the Japanese nationality because he was

The prisoners of war were not members of the armed forces but were members of the disarmed forces of the United States. Once inducted into the labor battalion after their capture by the Japanese Government, they were disarmed and were no longer members of the armed forces of the United States and were then prisoners of war in the control of the country having them. (See discussion in *In re Territo* (9th Circuit) (*supra*) 156 F. 2d 142.

* * * * *

3. Paragraph III of the Indictment charges "the defendant Tomoya Kawakita, at and near the said Camp Oeyama in Japan, at said open pit or mine and smelter in Japan, *continuously and at all times from August 8, 1944 up to and including August 24, 1945, being a citizen of the*

a Japanese from his birth under the Japanese law. It was stipulated that Tomoya Kawakita's parents were born in Japan, and by reason thereof have always been Japanese nationals or subjects owing allegiance to Japan, and that the defendant himself, by reason of his Japanese parentage, was from birth a Japanese national or subject owing allegiance to Japan under the law of Japan.

The court's Jury Instruction No. 11-E (1) reads as follows:

"It is stipulated that the defendant's parents were born in Japan, and by reason thereof have always been Japanese nationals or subjects owing allegiance to Japan."

"According to the law of Japan, *the defendant himself, by reason of his Japanese parentage, was from birth a Japanese national or subject owing allegiance to Japan.*" (Emphasis ours.)

The defendant, Tomoya Kawakita, was in Japan to which he owed allegiance during the period specified in the indictment.

The defendant was drafted to work in a munition factory and had been employed under jurisdiction of the Japanese military government during all times mentioned in the indictment.

The defendant himself believed that he was a Japanese owing allegiance to Japan during all times mentioned in the indictment. (See his testimony.)

United States and a person owing allegiance to the United States, in violation of said duty of allegiance," etc.

The indictment charged a continuous conduct of treason from August, 1944 until August 25, 1945. Since the jury found as to only eight of the overt acts, there was a variance between the pleadings and the proof of *continuous* treason, and the effect of the verdict was actually a disagreement by the jury as to the continuous character of the treason charged in the indictment. Again, the Government charged in its indictment that Kawakita was (1) a *citizen* of the United States and (2) a person *owing allegiance* to the United States, and (3) in acting in violation of said duty of allegiance. He, at that time, was presumptively expatriated, therefore a noncitizen of the United States. The proof showed he was a resident of Japan, a citizen of Japan, and owed 100% loyalty to the Government of Japan and therefore owed *no duty of allegiance* to the United States.

* * * * *

4. The indictment continues that "he did knowingly, intentionally, wilfully, traitorously and treasonably adhere to the enemies of the United States." It is the position of the appellant that he was a part of the enemy, he did not adhere to them and his acts were not knowingly, intentionally or wilfully done, but in the performance of his duty to the Government of Japan where he was then residing.

The evidence showed, without contradiction, that he thought that he was a Japanese subject; the Government of the United States is estopped because the Statutes told

him so; the regulations of our State Department told him so, and he was drafted for service in Japan and therefore was not acting knowingly, intentionally, or wilfully or traitorously or treasonably.

* * * * *

5. Paragraph IV of the indictment charges the aforesaid adherence of said defendant, Tomoya Kawakita, and giving of aid and comfort by him to Japan during the period aforesaid “consisted of serving as interpreter and foreman at the said prisoner of war camp, and at said open pit or mine and smelter, and in said capacity as interpreter and foreman of *compelling members* of the armed forces of the United States, who were then and there held by the Japanese Government as prisoners of war, *to perform labor* at said open pit or mine and smelter.”

The uncontradicted evidence shows that the defendant was drafted by the Japanese Government as an *interpreter* by the Japanese Government and was working at the said prisoner of war camp at Oeyama under such draft; that prisoners of war were there by operation of treaty, statute and regulation, and that the defendant had nothing to do with their being in the prisoner of war camp; that they were required to perform the labor assigned to them by the Japanese Government, and therefore that he was not *compelling them to perform labor at said open pit or mine and smelter*, but that such compulsion was by operation of International Law, Treaty arrangement with Japan and the United States through the exchange of telegrams and op-

eration of law. That there were no *armed forces* as prisoners of war—they were *disarmed* forces, disarmed by conquest of Japan, and were a labor battalion within the power of Japan. [See exchanges of telegrams attached to Exhibit CU.]

* * * * *

6. The indictment further continues, “and of *directing* and assisting the Japanese Military Forces having charge of the prisoners of war at said Camp Oeyama in the imposition of discipline and punishment on said members of the Armed Forces of the United States.” It was conceded in the trial that Kawakita did not direct the military forces, that Japanese military forces were in charge of the camp and they did all the directing, including threats of death to anyone who did not carry out their orders, and of themselves imposing summary punishment on prisoners of war who were guilty of theft, conspiracies to disobey the military authorities, theft of scarce and rationed foods, and destruction of government property, and that the summary (although severe punishment imposed) was the only punishment given to them—at the *direction of the military forces* and not at the direction of the defendant.

It was further conceded by the Government that the other persons involved were not members of the armed forces of the United States but were disarmed forces in captivity as a labor battalion.

It is the position of the appellant that, in this setting, there could be no treason.

* * * * *

7. The balance of the charge contained in paragraph IV, regarding the imposition of discipline and punishment

on such disarmed forces of the United States, might have constituted war crimes if they occurred but did not constitute treason.

The indictment further alleges that the aforesaid activities of Kawakita, would, tended to, and did assist the Japanese Government to utilize members of the *armed forces* of the United States, and the proof showed that they were *disarmed labor battalions* in the control of the Japanese Government, then a nation, pursuant to International Law and the use of these members of the disarmed forces was by operation of International Law and Treaties and not by reason of anything that Kawakita did or could have done.

* * * * *

8. The overt acts charged and found by the jury were eight in number—each of them alleged acts directed toward a prisoner of war, which the indictment erroneously calls “A member of the armed forces of the United States.” The proof was that each of the men was a disarmed member of a labor battalion, and not then and there a member of the armed forces of the United States.

None of these overt acts spring even remotely from or in aid and comfort and contact with the Government of Japan.

As to the overt acts, the jury found on eight of the overt acts, to-wit: Act (a), (b), (c), (d), (g), (i), (j) and (k) as having occurred. These acts at no time showed any intent to betray the United States nor were they in furtherance of betrayal.

* * * * *

9. The language of the indictment attempts to justify and excuse the crimes of the prisoners of war against the Japanese Government and in violation of the regulations of the prisoner of war camp. Each of the punishments alleged to have occurred at the direction of the military authorities was for violation of serious infractions of Japanese law and Japanese Military Regulation, and could have called for punishment up to death for conspiracy to violate such laws and regulations.

At all times mentioned in the indictment, Japan was a Nation with its own Sovereignty and its own laws. It had conquered and disarmed and imprisoned the men in the prisoner of war camp at Oeyama, and Japan had, shortly after the outset of the war, entered into binding agreements through the Swiss Government with the United States to maintain prisoner of war camps in accordance with the terms and provisions of the Hague Treaty. It, also, had laws for punishment for damage to government property; for theft of rationed foods, and for the maintenance of prisoner of war camps.

Pursuant to its own laws, prisoner of war camps were maintained, controlled and operated by the Military authority. The camp at Oeyama was in charge of a Military Commander, Lt. Hazama and two Sergeants.

The defendant was drafted by the Japanese Government in his job at Camp Oeyama. [Exhibit AB-I.]

Thirteen overt acts, all within the confines of Oeyama Camp or mine, were submitted to the jury. The jury found against the defendant on eight of them.

* * * * *

10. Of the eight overt acts found by the jury against the defendant: Five were punishment acts in which the military authorities of Japan were imposing summary punishments for stealing scarce and rationed foods, for breaking into the storehouse and committing burglary, for cutting up and destroying government property (blankets), and for returning from work earlier than scheduled. Another overt act was allegedly for not moving an injured man from the place of his injury to the camp for a period of a few hours. Another overt act was kicking a man "to compel him to greater exertion," when he was not exerting himself at all. And, the other overt act was in causing a prisoner of war to carry two buckets of paint instead of one bucket of paint—all in Japan at a time when it was a nation at war with the United States, and with whom there were treaty arrangements for the government of prisoners of war.

It was shown in the trial that these overt acts of punishment were directed and carried out by the Military Authorities, and that the defendant was subject to their direction and command under threat of death. Nowhere throughout the trial was it shown how these acts gave any "aid or comfort" to the government of Japan.

Sergeant Montgomery, a counter-intelligence officer of the United States, who himself from time to time slapped American prisoners of war for stealing, was in charge of the American prisoners of war in the camp. No charge of treason was ever lodged against him. He was a government witness in this case. [R. 227-37; 318.]

11. Immediately after the surrender of Japan, the American forces who were then prisoners took over the camp and the defendant was subject to their orders and commands. He assisted them throughout the entire period and until their departure. They used him as their principal interpreter. Had he been guilty of treason, they were required by law to have revealed the fact and court-martialed him or else they themselves were guilty of *misprision of treason*. (Title 18, Section 3, U. S. Codes 1946 Edition.) No prosecution occurred in Japan, although the defendant repeatedly reported to the Military Authorities subsequent to his departure and while awaiting his American transportation, and also to the American Consulate, which gave him a clearance and overcame (in 1946) the presumption of expatriation, as of June, 1946, which had theretofore covered and cloaked the defendant. Such administrative decision in 1946 did not overcome the statutory presumption cloaking the defendant at all times herein.

* * * * *

12. The Government of the United States, by the terms of the Nationality Act of 1940 told Kawakita that he was presumptively expatriated—that is, that he was a non-citizen—during this period of time and, therefore, told him that he presumptively owed no allegiance to the Government of the United States. The State Department Bulletin and Regulation 315.9 also told Kawakita that the political policy of the United States was not to afford protection to dual citizens residing in the country of their

other citizenship, and that they owed paramount allegiance to that Government and not the Government of the United States. It is the position of the appellant that under no circumstances herein set out could Kawakita be guilty of treason for allegiance to Japan and that the Government of the United States is estopped by law and by its regulations from prosecution under the circumstances herein.

It is further the position of appellant that there was no proof of any intent to betray the United States and that the overt acts were trivial and inconsequential in their setting and did not and could not give aid and comfort to the Government of Japan.

Our appeal is divided into substantive questions and procedural questions.

The substantive questions deal, first, with the citizenship question and second with the insufficiency of the overt acts in their setting to constitute treason as a matter of fact or of law.

The Setting Shows No Treason.

To use the words of the *Cramer* case, we must look at the setting, first of all, in which the acts occurred. As said in *Cramer v. United States*, 325 U. S. 1:

“The very minimum function of an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy.”

The Setting.

The setting of the Kawakita case was a prisoner of war camp and a mine connected with that prisoner of war camp in Japan. Kawakita, a citizen of Japan, was there by virtue of Japanese law and was presumptively, if not actually, expatriated from the United States. The prisoners were there by virtue of International Law, a part of the Supreme Law of the Land, Article I, Section 8, Constitution of the United States; *Ex Parte Quirin*, 317 U. S. 1. And, they were all subject to the Laws of Japan regarding theft and other crimes, and the rules and regulations of prisoners of war camps in Japan pursuant to International Law and International Treaties. [Defendant's Exhibit CU.]

The prisoners of war were all a labor battalion; they were within the power and control of the conquering government and the men were all disarmed laborers receiving the privileges of prisoners of war by a then conquering nation. They were legal slaves permitted to be such under International Law and the laws of war. They were impotent as warriors.

In this setting the acts complained of could not be treason.

In re Territo, 156 F. 2d 142;

Cramer v. United States, 325 U. S. 1;

Chandler v. United States, 171 F. 2d 921.

Also see *Prisoners of War a Study and Development of International Law* by William E. F. Flourny—a copy of which has been filed by the Appellant with the Clerk of the Court and lodged as an Exhibit.

While Japan was not a signatory to the Hague Convention, by an exchange of telegrams between the United States, Japan and the Swiss Government, acting as intermediaries, binding agreements were made between the United States and Japan as to the powers of each and the care and custody of prisoners of war. These are binding commitments and under it the Japanese government, therefore, had control of these labor battalions. [See Exhibits CU, CW.]

We have set these forth in the appendix to our brief under Statutes, Laws and Regulations.

Therefore the alleged acts and transactions in a prisoner of war camp, in a foreign country with complete sovereignty, affords no basis for a charge of treason.

The supreme law of the United States embraces the law of nations International Law, and Treaties, Laws of the Fighting Nations, and local rules and regulations of those nations in time of war.

Article I, Section 8 of the Constitution of the United States;

Article I, Section 7, Clause 3, Constitution of the United States;

Article IV, Section 2, Clause 3, Constitution of the United States;

Ex Parte Quirin, 317 U. S. 1, 87 L. Ed. 3;

Treaty of the Hague;

Japanese Rules and Regulations for Prisoners of War.

After World War II commenced, there was an exchange of agreement between the State Department of the United States and Japan through the Swiss government which the

State Department holds had the force of law. These documents are in evidence as Defendant's Exhibit No. CU, CW. Under the terms of this agreement between the United States and Japan, observance of the Hague Convention was to be had by both parties. Hence, all American soldiers who were in Camp Oeyama under that treaty constituted a non-combatant labor battalion. The men were required to work but receive wages for their work. They were under International Law and, under the treaty, subject to all the rules and regulations of the camp and all of the discipline of the camp. They received pay in accordance with their status and rank and rating. [Testimony of Sergeant Montgomery R. 219.] Their pay was ten sen or fifteen sen. They were required to do the work and were subject to all of the discipline which their failure to comply with the rules and regulations of the camp entailed.⁸ [And see testimony of Dr. LeMoyne Bleich.]

The kind of discipline that was enforced was for non-performance of the required quota of work, or for stealing and violating the laws governing the camp and the country

⁸Sergeant Montgomery testified [R. 219 *et seq.*]:

"Q. Now, you and the other prisons of war formed a labor battalion, is that correct? A. Well, I don't know whether you would call it battalion or not. The whole thing was a labor group.

Q. And you were in receipt of wages and the other men who were working there?

* * * * *

The Witness: 15 yen a day for n.c.o.'s., and 10 sen—sen rather than 15 yen a day for n.c.o.'s., and 10 sen a day for privates.

The Court: By n.c.o. you mean what?

The Witness: Non-commissioned officers." [R. 220.]

and thus, even depriving their countrymen and fellow prisoners of war of essential food which they stole, did not convert the case into a treason case.

See:

In re Territo, 156 F. 2d 142 (9th Circuit).

Assume that a Japanese American was placed under our draft laws in one of the Japanese relocation centers which we maintained during the war and that during one of the riots (which took place at some of the relocation centers) that the Japanese American enforced discipline in the riotous camp; that he struck some of the Japanese, because they were recalcitrant, because they failed to clean up or because they stole rationed food—could it be said that such a Japanese American, if we had lost the war instead of won it, would be guilty of treason to Japan by reason of such conduct? We respectfully assert that he would not.

In the setting of this case, Japan then had complete sovereignty. The soldiers had been disarmed elsewhere by the Japanese Government and were merely turned into a work battalion, as provided by International Law and by our treaties with Japan. Under those circumstances, the mere compelling of these men to work for their food and to be punished by the rules and regulations that governed their prisonership could not in this setting constitute treason under any circumstances.

Under its provisions and under the laws of Japan and the regulations thereof, the setting in a prisoner of war camp and prisoner of war employment place could not be a setting for the crime of treason, for any act or acts done to such prisoners of war for failing to do their re-

quired quota of work, for failing to obey the laws of the country in committing acts of theft or depredation, or for failing to render any medical assistance for a period of five hours.

In *Winthrop's Military Law and Precedents, Second Edition*, U. S. War Department Document No. 1001, page 778, it is stated:

"The Law of War as Specially Applicable to Enemies in Arms.

The conduct of war between civilized belligerents is required by modern usage to be governed by certain general principles—such as the following:

. . . VI. That each belligerent shall duly punish all persons within his lines who may be guilty of violations of the laws of war."

And, on page 792, it is stated:

"4. *Discipline.* Prisoners of war must conform to the laws, regulations and orders in force in the enemy's army, or country, and applicable to them, must require consideration with good faith, not concealing their true names, rank, etc., for the insubordinate or contumacious conduct must expect disciplinary measures."

In its setting, in a prisoner of war camp, all of these acts were of a local nature and were within the power of the conquering country, which had extended the benefit of a prisoner of war camp to the defeated enemy rather than kill them, as was done in other days.

The setting, alone, we respectfully submit, is not one that permits of the charge of treason. Nothing charged to have been done within such a prisoner of war camp

could give aid or comfort, could strengthen the enemy, or weaken the United States.

Under the facts of this case, also, the defendant was drafted by the Government of Japan to work in this setting and was compelled by the Government to do the work that he was doing in this setting, and as such he was obliged to be employed here. Such being the case, it could not give aid and comfort to the Government of Japan, nor could it aid their war effort or weaken our own.

Exclusive jurisdiction of the offenses upon which the conviction rests was in the Japanese army, see the Japanese military authorities, under the Hague Conventions of 1899, 1907 and the Geneva Convention of 1929, the Constitution of the United States Article I, Section 8, Hague Convention 1899, 2 Malloy U. S. Treaties and Conventions, pp. 2042, 2049, Hague Convention 1907, 2 Malloy, supra, pp. 2259, 2282, Geneva Convention of 1929, 4 Malloy, supra, pp. 5224, 5237, U. S. list of treaties in force December 31, 1941, p. 39. [See Defendant's Exhibits CU and CS.]

For a full discussion of the status of prisoners of war, see *In re Territto*, 156 F. 2d 142; Hale International Law, Chapter 3, Chapter 2, Section 131; Winthrop's Second Edition, Volume 2, point 2, Section 1228; Oppenheim's International Law, Sixth Edition; Floury, Prisoners of War; Hall International Law, pages 490, 497; Hydes' International Law, Section 675.

Treaties are in evidence as Defendant's Exhibits CU, CW. See also R. 3910-3985.

Japanese Laws, Rules and Regulations of Prisoners of War are also in evidence as Exhibit CS.

“Prisoners of War Punishment Law, Law No. 41, 9 March, 1943,” provides in Article 5 as follows:

“Persons who resist or fail to obey any order of any persons supervising, guarding or escorting prisoners of war, shall be liable so the penalty of death or penal servitude or imprisonment for life or for a period not less than one year.

Persons who in combination with other persons have committed any of the offenses specified in the preceding paragraph shall be liable, in respect of the ringleader, to the penalty of death or penal servitude or imprisonment for life, and, in respect of the other parties, to the penalty of death, penal servitude or imprisonment for life or for a period not less than 2 years.”

And provides in Article 6 as follows:

“Persons who have insulted any of the persons supervising, guarding, or escorting prisoners of war in his presence or in an open manner shall be liable to penal servitude or imprisonment not less than five years.” [Exhibit CS, pp. 77-78.]

These would apply to American prisoners who, contrary to orders, stole, ate forbidden foods, cut up government blankets, refused to work and individually or in combination resisted or failed to obey orders of the persons supervising them.

The treaties are all alike in providing that:

“Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the state in whose hands they have fallen.” [Exhibit CT.]

As a member of the family of nations, each state is entitled to claim rights under International Law, and simultaneously is obligated to fulfill its duties under the law.

Floury, "Prisoners of Wars," page 7.

The detaining state has: within the limit set by International Law, the right to utilize the labor of prisoners of war and to discipline them for insubordination. The exercise of this right may be beneficial both to the prisoner and to the detaining state. The prisoners may derive benefit from having an active occupation and the detaining state the benefit from decreased problems of discipline and increased labor resources.

See:

U. S. War Department Digest of Opinions of the Judge Advocate General of the Army, 1912-1930, with 1931 Supplement (1932, p. 1097, Sec. 22124).

For comment upon the place of the labor of prisoners in the economic structure of a state, see *Journal de Droit International* (Crunet 1916, page 1695).

³In ancient times, the Romans in times used their prisoners for festive purposes, a practice in which the Greeks did not engage. Prisoners of the Greeks were killed when they became an encumbrance, or when their slaughter would terrify the enemy and glorify the conqueror. In the later years, when enslavement became general, the law stepped between the Master and the Slave and forbade the killing of the latter without reason.

Vattel (Emmerich de Vattel *Le droit des gens*) Russo, says that when the enemy surrenders his life must be spared.

And, since prisoners of war must eat and be provided for, International Law has recognized that as long as a man is permitted by manner and customary International Law to live it is the right of the government to require prisoners below the rank of officers to work for the benefit of the detaining state, of private persons or organizations, or of the population in general.

For an excellent discussion on the status of prisoners of war, see this Court's opinion in *In re Territo*, 156 F. 2d 142.

In *In re Yamashita*, 327 U. S. 1, 72, provisions of the treaties between the United States and Japan were declared to be in force. (See also *Ex Parte Quirin*, 317 U. S. 1, 34; *Floury—Prisoners of War*, p. 23.)

In the treaties, the United States at the Hague, 1899 and 1907, it was stated:

“Nothing contained in this Convention shall be construed as to require the United States of America from its traditional policy of not intruding upon, interfering with, or entangling itself in the internal administration of any foreign state.”

The administration of the Japanese Prisoners of War Camps certainly were, at that time, within the internal administration of Japan. They were governed by their own laws, rules and regulations. Under the agreement between the State Department, therefore, we would have nothing to do with that. Articles of Treaties under the Sixth Article of the Constitution are placed upon the same footing and made of like obligation with other Constitutional provisions of the United States and with Acts of Congress. If an effect can be given to both it will. If inconsistent, the latest one will be controlling, providing the treaty provisions are self executing. (*Whitney v. Robertson*, 124 U. S. 190, 194.)

The provisions of the treaty obligations between the United States and Japan are self executing and are last in point of time. (See *Rosborough v. Rossell*, 150 F. 2d 809, 812, 813; *United States v. Reid*, 73 F. 2d 153 (C. C. A. 9).)

Various kinds of breaches of camp discipline occurred within the camp, according to the allegations of the indictment and the evidence at the trial. Failure to meet the requirement of the Commanding Officer as to work was a breach of the camp discipline—the Commandant's orders.

The other acts were penal offenses in their nature—burglary, theft, stealing scarce and rationed foods (which would deprive other prisoners of war of their share of food), cutting up and destroying government property. (See Geneva Convention 1929; Hague Convention 1907; Hague Convention 1899; Exhibits in evidence.)

The Government of American prisoners of war in a Japanese prisoner of war camp in Japan was purely the function and power within the Government of Japan. Any act by a Japanese citizen within it did not and could not constitute treason or the violation of any laws of the United States at the time.

The act of Congress, Title 18 U. S. Code, Sec. 1, should therefore not be given extra territorial effect in a foreign prisoner of war camp. To provide the same as treason in the case of a dual citizen residing in enemy territory, as in the case of those residing in the United States, would be unreasonable and create a bad precedent. In fact, it is a two-edged sword.

Assume that the United States had lost the war instead of won it; would the Japanese interpreters in American Prisoners of War Camps be subject to punishment as

traitors to Japan? We must remember that we also had riot in our own Japanese Internment Camps and that interpreters were called upon to aid the officers in charge in the disciplining and interpreting of discipline in those camps. Under the construction attempted to be placed in this case, these men would be guilty of treason to Japan, although residing in the United States, because they happened to be dual citizens of both countries. The Treason Statute should not be so construed.

It has always been recognized that, by reason of the obligation of allegiance to the country of residence, there might be in such a case "adherence" which was not criminal.

The Venus, 8 Cranch 253;

McConnell v. Hector, 3 Bos. 6 Fuller's Reports, 113, 114;

Hale: Pleas of the Crown, pp. 164-165.

Indeed, prisoners of war may volunteer for work "for a variety of purposes designed directly to aid the captor in the prosecution of the war, enabling it to release potential fighters from non-military tasks of which the proper performance might be, nevertheless, a military necessity."

3 Hyde: *International Law*, p. 1851;

War Department: *Rules of Land Warfare*, Sections 100-104;

Geneva Convention of 1929, Art. 27.

In this setting then, there was not and could not be treason by the defendant.

The Citizenship of the Appellant.

As we said under the heading "The Failure of Proof" it was conceded, at all times, by the government, and the court so instructed the jury, that the defendant was at all times a *citizen of Japan* during the entire time he was residing in Japan. [Clk. Tr. p. 310.] While born in the United States, he was presumptively expatriated from his American citizenship by the terms of the Nationality Act of 1940 and his continued residence in Japan for five years.

We repeat, in such a setting, the defendant owed total loyalty to Japan and he could not, therefore, be guilty of treason even though he might have a contingent citizenship in the United States of America. He was, under the Nationality Act of 1940, at all times presumptively expatriated from the citizenship of United States because of his residence in Japan. (See Nationality Act Sections 401 and 402; U. S. C. 801 and 802; Nationality Code Regulation 315.9.)

Being a citizen of Japan and presumptively expatriated from his citizenship of the United States, there was, at that time, no obligation of loyalty to the United States in any manner, shape or form, and therefore in this setting he could not be guilty of adhering to the enemy—he was the *enemy*, and he could not give them aid and comfort. We will treat of this more fully later on.

See the following cases:

Carlisle v. United States, 16 Wall. 147;

United States v. Fricke, 259 Fed. 673, 682;

The Benito Estinger, 176 U. S. 568, 571;

The Rapid, 8 Cranch. 155, 160-161;

The Eliza, 4 Dall. 37, 40.

The Venus, 8 Cranch. 253;

The Frances, 8 Cranch. 335;

The Marian Susan, 1 Wheat. 46;

Mrs. Alexander's Cotton, 2 Wall. 404;

Miller v. United States, 11 Wall. 268;

Fore v. Tearget, 97 U. S. 594;

Juragua Iron Company v. United States, 212 U. S. 297.

The Government of the United States recognized dual citizenship at all times. Its political branch, the State Department, removed its protection from such dual citizens while residing in the other country. The policy of such political branch of the government is binding on the courts in the absence of a showing that it is wrong.

United States v. Johnson, 124 U. S. 236;

Reid v. United States, 73 F. 2d 153 (C. C. A. 9);

Mexico v. Hoffman, 324 U. S. 30, 38, 42.

The government is therefore estopped from claiming allegiance from one whom it ceases to protect and to whom it states that he owes his paramount allegiance to the other country where he is residing and whose citizenship he has.

Dual Citizenship of Appellant.

It is undisputed that the defendant had dual nationality, that is to say, that by reason of the fact that his father and mother were born in Japan, and were at all times Japanese citizens and subjects, he was a Japanese citizen; and by reason of his own birth in the United States of America, he was an American citizen.

Dual nationality was prior to and at all times recognized by the Supreme Court of the United States.

As stated by the Supreme Court of the United States:

“The municipal law determines how citizenship may be acquired,” and

“It follows that persons may have a dual nationality.”

Perkins, Secretary of Labor, et al. v. Elg, 307 U. S. 325, 329 (1939).

The classic example of dual nationality is that of a person like the defendant, born in the United States of nationals of Japan, who acquired at birth the nationality of the United States by reason of his place of birth, *jure soli*, and acquired the nationality of his parents by virtue of their nationality in Japan, *jure sanguinis*⁵ in Defendant's

⁵In *Perkins v. Elg*, 307 U. S. 325, 329, the Court said:

“The classic example of dual nationality is that of a person born in one country of nationals of another country who acquire at birth the nationality of the former by reason of the place of birth, *jure soli*, and that of the latter by virtue of the nationality of the parents, *jure sanguinis*.”

Exhibit No. DR the State Department Bulletin as follows:

The State Department has said:

"20. Dual nationality.

Persons born in the United States of unnaturalized parents acquire American citizenship under American law and as a general rule also acquire the nationality of the country of which their parents are nationals. Often foreign nationality is retained notwithstanding the subsequent naturalization as citizens of the United States of their parents during the minority of the person born in the United States. A person possessing the nationality of both the United States and a foreign country, who habitually resides in the territory of such foreign country and who is in fact most closely connected with that country, should not expect to receive the protection of this Government while he is residing in such country, and it is not the practice of the Department to make representations in his behalf with a view to his release from the performance of military or other obligations to the foreign country."

It is undisputed in the evidence in this case and the trial court so instructed the jury that the defendant had Japanese nationality. It is also undisputed he was residing in Japan. Under such circumstances, he owed 100% allegiance to Japan and could not be guilty of treason to the United States.

This government recognized that many persons are born citizens or subjects of two countries under their respective laws. And, in respect to their obligations when residing in one of country of their citizenship, this country has held that in respect to calls of military duty, or other obligations of *allegiance*, to the place of their residence, the country of their residence has the paramount claim to loyalty and therefore necessarily the total allegiance of such person.

The State Department has forewarned all citizens of dual nationality that this country will not interfere with

the claims of the other government for military service, or any other service in time of war.

See Department of State Bulletin [DR for identification], Section 20, on the subject of dual nationality.

In re Territo, 156 F. 2d 145;

Series of State Department Correspondence with Foreign Governments set out in Hackworth Digest of International Law, Volume 3, Page 352, Sec. 255 *et seq.*

See:

Perkins v. Elg, 307 U. S. 325.

Article II of the Inter-American Convention on the status of aliens, signed February 20, 1928, provides:

“Foreigners are subject, as are nationals, to local jurisdiction and laws, due consideration being given to the limitations expressed in conventions and treaties. 46 Stat. 2754; Four treaties, etc. (Trenwith, 1938, 4723.)”

And, *In re Territo*, 156 F. 2d 142 (C. C. A. 9), the court said, quoting *In re La Marrs Executor v. Brown*, 92 U. S. 187, 194, 23 L. Ed. 650:

“In war, all residents of enemy country are enemies.”

Whiting's War Power Under the Constitution, 340-342 says in part:

“A neutral, citizen of the United States, domiciled in the enemy country, not only in respect to his property, but also in his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation.”

And again the case quotes *In Jaragua Iron Company v. United States*, 212 U. S. 297, 63 L. Ed. 520, and the court in the course of its opinion said:

“Under the recognized rules governing the conduct of war between two nations, Cuba being a part of same, with enemy sentry and all persons, whatever their nationality, who resided there, were, pending such war, to be deemed enemies of the United States and of all its people.”

This case also quotes Mr. Floury in his richly authenticated book “Prisoners of War,” page 30, to the fact that Irishmen though then subjects of Great Britain who had taken the oath of allegiance to the South African Republics during the Boer War were treated as prisoners of war. (See *Moyer v. Peabody*, 312 U. S. 78, 53 L. Ed. 410; *Streling v. Constance*, 287 U. S. 378, 77 L. Ed. 375.)

In *American Banana Co. v. United Fruit Company*, 213 U. S. 347, 356, it is stated that:

“The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where it is done.”

And this country held in the case of a British subject that while he was in the United States he owed local allegiance to the United States of America.

Carlisle v. United States, 83 U. S. (16 Wall.) 147, 21 L. Ed. 426.

The term citizenship and nationality refer to the status of the individual in his relationship to the state and are often used synonymously.

The word "nationality" has a broader meaning than the word "citizenship." In *Gloria v. United States*, 231 U. S. 9, 22, 23:

"Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other."

And the solicitor for the Department of State in an opinion to that department said that:

"Allegiance is a political obligation between sovereign and citizen of a reciprocal character, involving obedience on the part of the citizen and protection on the part of the sovereign."

A Person Holding Dual Nationality Cannot Be Guilty of Treason When He Exercises 100% Allegiance to the Country of One of His Nationalities Wherein He Is Residing.

This is consistently shown by the attitude of our own State Department which recognizes dual nationality and recognizes the obligation of a citizen of the United States and of another country while residing in that country to enter into its armed forces when called upon to do so.

In re Territo, 156 F. 2d 142 (C. C. A. 9);

Perkins v. Elg, 307 U. S. 325.

Savorgnan v. United States, 94 L. Ed. (Adv.) 203.

Territo, on August 25, 1945, filed an action, while being held in the United States as a prisoner of war, to declare himself to be a United States national. He had been taken prisoner while serving in the Italian forces on the field

of battle, by the United States Army in Sicily, on July 23, 1943. Pursuant to the Geneva convention, he was brought to the United States and held in custody as a prisoner of war and required to work in labor in the United States. This court held that this had been the country of his birth; nevertheless it denied his release on *habeas corpus*, although he was an American in America. Being under the control of the military of the United States, the court left him where he was and he went back to Italy.

The State Department's ruling on its rights and obligations to persons of dual citizenship has been set out in various bulletins to the American Consulate. In these various bulletins, it has warned persons holding dual citizenship that:

“A person possessing two or more nationalities who habitually resides in one of the countries whose nationality he possesses and who in fact is most closely connected with that country cannot look to protection from the other country.”

In *Carlisle v. United States*, 83 U. S. 426, 16 Wall. 147, the Court said:

“‘Every foreign born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country.’ And again: ‘Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the tak-

ing of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation.' 6 Web. Works, 526.

The same doctrine is stated in Hale's Pleas of the Crown, Vol. I, ch. 10, East's Crown Law, Vol. 1, ch. 2, §4, and Foster's Discourse upon High Treason, §2, p. 185, all of which are treatises of approved merit.

Such being the established doctrine, the claimants here were amenable to the laws of the United States prescribing punishment for treason and for giving aid and comfort to the rebellion. They were, as domiciled aliens in the country prior to the rebellion, under the obligation of fidelity and obedience to the government of the United States. They subsequently took their lot with the insurgents, and would be subject like them to punishment under the laws they violated, but for the Proclamation of the President of December 25, 1868."

The Assistant Secretary of State, Olds, wrote to Minister MacMurray, No. 202, April 19, 1926, M. S. Dept. of State, file 393.1121 to Chu Shea-Wai, as follows:

"It is a generally recognized rule, which may be regarded as a rule of international law, that when a person who was born with dual nationality is residing in either of the countries of which he is a national, that country has a right to assert

its claim to him without any interference by the other, unless perhaps such person having reached the age of majority has clearly elected the nationality of the other country and is only temporarily residing in the country asserting the claim. Even in the latter case, it cannot be asserted with any degree of confidence that the country in which the person is found has no right to assert its claim to his nationality and allegiance as it may not recognize the principal's election. It is not believed that extra territoriality affects this rule . . . It seems clear that Chu Shea-Wai, although he is a citizen of the United States under the law of this country, because of the fact that he was born in this country, is also a citizen of China under the law of that country, because his father was of Chinese nationality, and it does not appear that the existence of extra territorial jurisdiction in China interferes in any way with the right of China to claim this individual as a Chinese citizen."

The State Department has consistently refused to interfere where foreign governments have claimed the duty of dual citizens to perform duties of allegiance to the country of their residence. A minor born in the United States of French parents was held to be liable in the performance "of duties of allegiance in the country in which he actually lived, if by the law of that country he is considered as a citizen and if his parents have not renounced allegiance to that the country of his birth affords the child no protection during his minority." The State Department held, therefore, that:

"The young gentleman in your memorandum is liable to be drafted in the French Army. Opinion of

the Office of the Solicitor for the Department of State, February 23, 1910." (1910 Solicitors Opinion 1, page 297.)

Frank Arnold Godfrey was born in Texas in 1893, of British parents, and taken by them to New Zealand in November, 1901. The Department of State said that it could not interfere to relieve him from the performance of duties and the performance of duties as a British subject, while he remained within British jurisdiction. The Chief Clerk Carr to Consul General Prickitt No. 78, May 5, 1910, M. C. Department of State File 10154-65.

William McCormack, born in the United States in 1875 of Irish parents, was taken to Ireland when four months old. He returned to the United States in 1894 and remained ten years, at the end of which time he went to Dublin and enlisted in the British army, taking an oath of allegiance to Great Britain. The Department of State rejected his request for assistance in obtaining a discharge from the British Army.

We come then to the obligations flowing from the relation of State to its nationals. These are reciprocal in character. This principle has been amply stated by the Supreme Court of the United States in *Luria v. United States*, 231 U. S. 9-28. wherein it says:

"Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other."

Allegiance, as the term is generally used, means fidelity or fidelity to the government of which the person is either a citizen or subject.

Murray v. The Charming Betsy, 6 U. S. (2d Cranch), 64, 120, 2 L. Ed. 208.

Mr. Story says *allegiance* is:

“Nothing more than the tie or duty or obedience of the subject to the sovereign under whose protection he is.”

Wong Kim Ark, 169 U. S. 649, 42 L. Ed. 890.

“Allegiance is that duty which is due from every citizen to the state, a political duty binding on him who enjoys the protection of the commonwealth, to render it a service and fealty to the federal government. It is that duty which is reciprocal to the right of protection, arising from the political relations between the government and the citizens.”

Wallace v. Harmstad, 44 Pall. (8 Wright 492, 501.)

In *Carlisle v. United States*, 83 U. S. (16 Wall. 147, 154), 21 L. Ed. 426, the court said:

“By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his

government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance which continues during the period of his residence.”

This allegiance is continuous during his residence. The court did not say *partial* allegiance, or *dual* allegiance, but allegiance means total allegiance. (See *United States v. Kuhn*, 49 Fed. Supp. 407, 414.)

The State Department recognizes this in its bulletins on dual nationality.

In the decision of *Oyama v. California*, 332 U. S. 633, at 666, is the doctrine that one residing in the country, receiving the benefits of that country, owes loyalty and the desire to work for the welfare of that state while there. This is not a divided loyalty but a total one.

Thus it may be seen that a citizen owes loyalty to the country of which he is a citizen and in which he lives. That is 100% loyalty—not 50%.

Title 18, Section 1 uses the expression, “Whoever, *owing allegiance* to the United States.” This expression supposes that some citizens do not owe allegiance to the United States. Dual citizens would fall in this class—just as Americans in foreign countries drafted or inducted into such foreign army could not “owe allegiance” to the United States.

In *In Re Territo*, holding that one can be an alien enemy notwithstanding American citizenship, imposes two questions which must be distinguished: (1) Whether there is a status created by dual nationality which occupies a sort of middle ground between citizenship and non-citizenship, which places the person occupying that status beyond the scope of the treason statutes, when in the country of one of its citizenships at war with the other; and (2) Whether the status of dual nationality and the conduct of one occupying that status are significant because they have some bearing on *state of mind*, *i. e.*, whether treasonable intent is present. A third, although not parallel problem is the one which arises from the presumption of expatriation by residence abroad for a period of six months or more created by Section 802 of Title 8. This presumptively expatriates or suspends American citizenship during that period.

The second important significance of the period of existence of the presumption prior to rebuttal is its bearing upon state of mind. The presumption of knowledge of the law, if applicable to the non-resident, would seem to require that the conduct of the non-resident during the existence of the presumption is to be considered in the light of the fact that the non-resident is presumed to have acted in the belief that, under the law, he was presumed to be an expatriate and not a citizen owing allegiance to the United States.

With respect to question (1) above, the inquiry can be stated more simply: Can an *enemy alien* holding a foreign

and presumptively or actually expatriated American citizenship be guilty of treason?

The answer is obviously "no."

If Kawakita was only presumptively expatriated he had no duty to the United States during his presumptively expatriated citizenship after the outbreak of the war and after the passport had expired. This government had, in fact, incorporated in its notice on passport regulations that those of dual citizenship could not expect protection from the United States if called into service of the Government where they were residing.

Since this Government could not extend the protection of citizenship and, furthermore, it did not, it ceased to have any reciprocal obligations of allegiance during such a period of time. Having itself suspended its protection, it could not look for allegiance from those whose only return for allegiance was the protection of the Government.

The Court below misconstrued the effect of the Fourteenth Amendment to the Constitution upon the petitioner. It is true that the Fourteenth Amendment conferred citizenship upon him by reason of his birth in the United States. It had a constitution and statutory effect giving him the great blessings of citizenship in the United States so long as it was in a position to return those blessings—personal and protective while he was living in the United States and by way of passport when he went abroad. But all these had ceased. It was never the intention of our country to inflict the claim of citizen-

ship permanently and for all times. This was the claim of the totalitarian governments. On the contrary, the Congress in 1868 passed what is now Title 800, Section 8, the Nationality Code, giving citizens an inalienable right to expatriate themselves.

It was shortly thereafter our own Attorney General in our own State Department notified foreign governments that those who had taken on citizenship in the United States could not be compelled or forced into military service, or called back to military duty in the countries which held that they had no right of expatriation. (See *Perkins Secretary of Labor, et al. v. Elg*, 307 U. S. 325, and 99 F. 2d 408.)

Thus, Kawakita living in Japan under a Japanese residence, the presumption of expatriation having applied to him rulings of the State Department, that in case of dual nationality the State Department would not interfere with the local authorities, was subject to the draft of that country, and having been drafted for the services which he performed, he owed 100% allegiance to Japan in return for its citizenship and its protection, and therefore could not be punished for the crime of treason as he then and there did not owe any allegiance to the United States of America.

The words "adhering to," giving "aid and comfort" to the enemy, as contained in the Constitutional definition of treason and also charged in the indictment [Rep. Tr.. pp. 27-28] admits that the person is not of the nationality or

citizenship of the country to which he “adheres” and to which he gives aid and comfort.

Under the doctrine of dual-nationality, Kawakita could not *adhere* to Japan if he was a Japanese citizen. This was conceded. He could not give aid and comfort *to* the enemy, as he was in fact a part *of* the enemy, and as one of its citizen owed it one hundred percent allegiance.

In re Territo (9th Cir.), 156 F. 2d 142, and cases cited therein.

Mr. Chief Justice Marshall held in *United States v. Burr*, 25 Fed. Case No. 14693 and in *Ex parte Bollman*, 4 Cranch. 75, 8 U. S. 554 (1807), that a strict interpretation of the constitutional provision was called for by American experience in the formation of its own nationality. The Chief Justice said:

“To prevent the possibility of those calamities which result from the extension of treason to offenses of minor importance, that great fundamental law which defines and limits the various departments of our government has given a rule on the subject both to the legislature and the courts of America, which neither can be permitted to transcend . . . It is, therefore, more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition should receive such punishment as the legislature in its wisdom may provide.” (Emphasis ours.)

As stated by the Chief Justice in *United States v. Burr*, 25 Fed. Case No. 14693, the court said:

“The whole treason laid in this indictment is the levying of war in Blennerhassett’s island, and the whole question to which the inquiry of the court is now directed is, whether the prisoner was legally present at that fact . . . but the counsel for the prosecution seem themselves not to have sufficiently adverted to this clear principle, that though the overt act may not be itself the treason, it is the sole act of that treason which can produce conviction.”

Here the question to which inquiry is directed is whether the defendant, although legally present in the prisoner of war camp as a drafted employee, working under the command and orders of the Japanese Government as an admittedly Japanese citizen, could in relation to the labor draft of American prisoners of war who were totally disarmed be guilty of treason where the sole acts alleged committed were alleged committed by him in his capacity as a Japanese national, drafted as such and regarded as such by the Government of Japan, and where such punishments as were being carried out upon the prisoners of war were for violation of the laws of Japan and the rules and regulations of the camp, issued pursuant to a treaty arrangement between the United States and Japan.

Treaties of the United States are the Supreme Law of the land. (Article VI, United States Constitution.)

Reid v. United States, 73 F. 2d 153 (C. C. A. 9).

An exchange of letters between the United States and Japan made the terms of the Geneva Convention the supreme law of the land under the doctrine of *mutatis mutandis*. [See Exhibits CT, CU and CV, in evidence.]

In both treaty series 539 [CV in evidence] and treaty series 846 [CU in evidence] and [CS in evidence], Article 628, pages 25, 26 and 27, give the terms under which the enemy government may intern prisoners of war and put them to work under labor battalions and states that such prisoners of war are in the power of the government seizing them, and provides further that prisoners of war must obey all of the rules and regulations of the enemy government in any prisoner of war camp, and are subject to all of the punishments of such foreign government that they might inflict on their own soldiers.

Thus, under International Law, the Law of Nations, the Hague Treaty and in the setting of the prisoner of war camp, who were then under International Law in the power of the hostile government, there could be under no circumstances in this case any treason committed.

Article VI, United States Constitution;

Ex parte Quirin, 317 U. S. 1, 87 L. Ed. 3;

Cramer v. United States, 325 U. S. 1;

In re Territo, 156 F. 2d 142;

Treaty Series 846 and Treaty Series 539, Rules and Regulations for the Government of Japanese Camps [Deft. Ex. CS].

II.

The Trial Court Erred in Failing to Dismiss the Indictment or Enter Judgment of Acquittal for Failure to State an Offense Against the Laws of the United States.

The trial court erred in failing to grant the motion to dismiss the indictment at the beginning of the case, at the close of the Government's case, and at the close of the entire case and to grant judgments of acquittal made therein.

We have already argued and presented law to show (1) That a dual citizen residing in the country of one of his citizenship has paramount allegiance to that government, and that this is inconsistent with any duty of allegiance to the United States. That is to say he owes 100% allegiance to that government while residing there, and in time of war is considered an alien enemy. (*Ex parte Quirin*, 317 U. S. 1, 87 L. Ed. 3; *In re Territo*, 156 F. 2d 142; *Carlisle v. United States*, 16 Wall. 147; *Perkins v. Elg*, 307 U. S. 325.)

Where a person has dual citizenship and the Statute and previous decisions have made it clear that this country recognizes such dual citizenship, and that he owed paramount allegiance to the country in which he resides he is under no necessity of guessing where his loyalty lies, or whether the treason statute in the former country applies to him. Under such a situation, his acts cannot be *wilfull* acts for he does not do any act with specific intent. He does the acts in good faith. Otherwise, the declarations of the State Department as to the paramount loyalty of a dual citizen would be a trap for his other country to prosecute him for treason. The policy of the State Department is binding on the courts. (*Reid v. United States*,

73 F. 2d 153 (C. C. A. 9); *Mexico v. Hoffman*, 324 U. S. 30.) This is not permissible. Our government is estopped from prosecution under such circumstances.

A citizen does not have to guess at the plain meaning of Government Statutes and Regulations and State Department Bulletins and interpretations which are issued for his benefit, and to expect that at a later time they will be changed by judicial construction. In this sense, therefore, there was no proof of wilfulness. (See *Screws v. United States*, 325 U. S. 104; *M. Kraus & Bros. v. U. S.*, 327 U. S. 614, 90 L. Ed. 894.)

In the United States, a Japanese subject born in the United States, having dual citizenship, was required to have 100% obligation to the United States; and if they failed to respond to selective service, even if they denounced their American Citizenship, they were liable to prosecution. The same policy was therefore properly applicable in Japan to Japanese citizens of American birth.

Okamoto v. United States, 152 F. 2d 905;

Takeguma v. United States, 156 F. 2d 437;

Fujii v. United States, 148 F. 2d 298.

As said in *Carlisle v. United States*, 16 Wall. 147:

“Being both a citizen and resident of Japan, he owed 100% allegiance to Japan, and did he disobey the Japanese he would be guilty of treason regardless of citizenship.”

Carlisle v. United States, 16 Wall. 147;

Radich v. Hutchins, 95 U. S. 210;

Dejager v. Attorney General of Natou (A. C. 326);

Leonhard v. Eley, 151 F. 2d 409 (C. E. A. 10);

Ex parte Quirin, 317 U. S. 1, 87 L. Ed. 3.

While residing in enemy territory, he was an alien enemy for all purposes. (*In re Territo*, 156 F. 2d 142; *Ex parte Quirin*, 317 U. S. 1; *Okamoto v. United States*, 152 F. 2d 905; *Takeguma v. United States*, 156 F. 2d 437; *Fujii v. United States*, 148 F. 2d 298; The War of 1812, The Venus, 8 Cranch 253; The Frances, 8 Cranch 335; The Mary & Susan, 1 Wheat. 46; Civil War, Mrs. Alexander's Cotton, 2 Wall. 404; *Miller v. United States*, 11 Wall. 268; *Ford v. Surget*, 97 U. S. 594; *Spanish American War, Juragua R. & Co. v. United States*, 212 U. S. 297; *Herrera v. United States*, 222 U. S. 558; *World War I, Kahn v. Garvan*, 263 Fed. 909 (S. V. N. Y.); *Taber v. United States*, 81 Court of Claims 142; Certiorari denied 296 U. S. 96; Present War, *In re Territo*, 156 F. 2d 142; *Ex parte Quirin*, 317 U. S. 1, 87 L. Ed. 3.)

See *LaMars Executor v. Brown*, 92 U. S. 187, 23 L. Ed. 650, wherein the Court said:

“In war, all residents of enemy country are enemies.”

Guiding's Powers under the Constitution, 340-342:

“A neutral or a citizen of the United States.”

If Kawakita had been drafted into the fighting forces of Japan instead of merely into a prisoner of war camp and had actually gone out in the field of battle and shot and killed our own soldiers, he would not have been subject to prosecution for treason, even though he gave, in such circumstances, actual aid and comfort to the enemy, and aided their forces in war.

We ourselves have recognized the obligation to answer to the American draft by compelling Japanese

—even those who had renounced their American citizenship—to join our American armed forces in fighting against Japan. That was a duty which they owed in return for their residence and protection of this country while living in this country.

Okemoto v. United States, 152 F. 2d 905;

Takeguma v. United States, 156 F. 2d 437.

We, therefore, contend that Kawakita, under his dual citizenship, was Japanese, owing all allegiance to Japan during his residence in that country, and could not be guilty of treason to the United States.

If Kawakita were in the United States he would have been drafted to fight against Japan. He might have been assigned to one of our own prisoner of war camps where we also had riots and disobedience. If we had lost the war, instead of won it, would he then be guilty of treason to Japan? This would indeed be a dangerous, unfair and wrong precedent, and not sound law.

When any fact will support two inferences, one of innocence and the other of guilt, it does not prove guilt.

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339;

Manley v. Georgia, 279 U. S. 1, 7;

The Bothnea, 2 Wheat. 169, 177.

The defendant was covered by an American statutory presumption of expatriation.

Kawakita's Japanese Citizenship.

There was total protection given by the Government of Japan to Kawakita; its armies were fighting and he was receiving its food and sustenance and his liberty. By the laws of the United States he was presumptively expatriated. There was no protection being given to him by the Government of the United States, nor was it obligated to do so, for by statute he was presumptively expatriated. The duty of allegiance to the United States, in this setting, and under these circumstances, had ceased. There were no mutual obligations, the first essentials of citizenship and allegiance.

In this setting, his duty of allegiance was solely to the Government of Japan. One cannot serve two Gods or two rulers or two masters. The law had fixed the defendant's loyalty to Japan, and presumptively expatriated or suspended his allegiance to the United States.

The trial court instructed the jury that: "According to the law of Japan, the defendant himself, by reason of his Japanese parentage was from birth a Japanese national or subject, owing allegiance to Japan." [R. 5504.] By the terms of the Nationality Act of 1940 (Sec. 402 of the Nationality Act, 8 U. S. C. Sec. 802) the defendant had Japanese citizenship, and, was employed in a position as interpreter with the military government of Japan. Therefore, his duty of allegiance to the United States was suspended by reason of the statutory presumption of expatriation during the entire period of time covered by the indictment.

From early history long residence in a foreign country has been considered presumption of expatriation. California terminates its citizenship upon change of residence.

The United States Nationality Act of 1940 provided that a person with dual citizenship, residing in the country of his other citizenship for six months or longer, accepting or performing the duties of any office, post or employment *under* the government, is *presumptively expatriated* from the United States. By State Department Bulletins, also, he was told that he could not expect protection from the United States while residing in the country of his other citizenship, and that he owed such other country paramount allegiance.

A presumption is legal proof of a fact *unless and until* overcome. And a jury are bound to accept it. By statute and regulation the presumption, when and if overcome, is only overcome as of the date of such administrative finding and is not retroactive.

Such announced political policy on the part of the government is binding on the courts (*Reid v. United States*, 73 F. 2d 153; *Mexico v. Hoffman*, 324 U. S. 30, 38, 42; *Perkins v. Elg*, 307 U. S. 325) and estops the limited states from prosecuting one of its dual citizens presumptively expatriated and residing in the foreign country of its other citizenship.

If the court holds, as we feel it must, that Kawakita, as a dual citizen, residing in Japan, was presumptively expatriated from the United States he therefore could not be guilty of treason. We need not consider the next argument. However, if the court holds against these contentions we then further contend that:

Under Japanese law the defendant, Tomoya Kawakita, had actually expatriated himself and therefore could not be guilty of treason. Japan's recognition of

Kawakita's election was binding upon the United States.

The defendant, Tomoya Kawakita, was seventeen years old when he went to Japan. Although he had been born in the United States, both his father and his mother were Japanese citizens, and by reason of Japanese law he was by birth a Japanese subject born in the United States.

Cut off from his father's allowance, needing work which required him to be a Japanese National, Kawakita applied for such work after his graduation from the Japanese University. (See *Chandler v. United States*, 171 F. 2d 685.)

His American passport had expired and its renewal had long expired, and he had then been residing in Japan more than four years. Thus, in 1943, Kawakita was questioned by the police because he was registered as an "alien" holding American nationality. He was told by the police that he had to make an election as to whether he would be Japanese or American. He went home and talked to his uncle, who told him that he should elect to be Japanese and have his name entered on the family Koseki. Up to that time his name was not so entered.

He was then 21 years of age. He went with his uncle to the City Hall and had his name entered on the family Koseki. He affixed his seal on the registration and told the clerk he wanted to be recognized as a Japanese citizen. Thereafter he changed his address. The address was changed on the University registration cards. [See Exhibit 4.] His address, when he applied for employment was given as the Japanese address.

The Japanese police removed his name from the alien register and recognized that that procedure was the formal

election of Japanese nationality. (See Title 801, U. S. C., Subd. (a).) He thereafter went about freely from city to city in Japan. He went to China for the company on a *Japanese passport*. Mr. Satoru Mori, the President of the Company, said he would not have been hired had he not been a Japanese National. Fujizawa, another interpreter, had to get a special permit from the army while he was taking on Japanese nationality. The Attorney General of Japan, in his deposition, states the entry of Kawakita's name on the family register is a "reaffirmance of an allegiance that already exists."

Section 801 of the Nationality Code, paragraph (a), recognizes the right of election of a dual citizen who thereafter is deemed to have lost his American citizenship. (See Appendix G(a).)

It further provides that a person who is a national of the United States, whether by birth or naturalization, loses his nationality by:

(b) "Taking an oath or making an affirmation, or other formal declaration of allegiance to a foreign state."

Section 401(b), 54 Stat. 1169.

The acts of Kawakita were an election of Japanese nationality. It was recognized by Japan. His subsequent acts were certainly a *formal* declaration of allegiance to a foreign state before a Japanese state official. He went to the City Hall to the Registrar's Office and had his name entered in the family Koseki, put his seal on the matter, and did everything that that country required according to its law to declare his allegiance to Japan.

The Attorney General of Japan said it *reaffirmed* an allegiance that already exists. [Exhibit A.] And Japan recognized both the election and affirmation.

In this respect it therefore was no different than an American citizen who already owes allegiance to the United States reaffirming his allegiance to the United States when he takes another oath to support and uphold the Constitution of the United States. (We hear much of loyalty oaths these days.) It is no different than an attorney takes, when he already is a citizen of the United States, when he is sworn in as an attorney at law or receives admission in another court. It is no different than a voter going down to the registrar of voter's office and *registering* to vote. He reaffirms his citizenship and declares his right to vote. When he went to China on a Japanese passport he again made formal declaration.

Japan's legal construction of allegiance to Japan is binding in this case. The testimony of Police Officer Sasaki [R. 3866, 3873] was that Kawakita's name was removed from the alien register at the police station. President Mori said he would not have hired Kawakita if his name was not in the clear on Japanese nationality and each day at Camp Oeyama he affirmed his allegiance to the Emperor. Thus, throughout the entire case it was recognized that Kawakita had Japanese nationality. The trial court even so instructed the jury but told them it did not make any difference whether he had Japanese nationality. It clung to the ancient totalitarian doctrine that once a citizen always a citizen, and that the United States could hold onto its subjects abroad, regardless of their election.

Section 800 of the Nationality Code recognizes the American's right to sever the obligation of citizenship, or expatriate himself and remove his right to protection in a foreign country.

Kawakita did not claim exemption from the draft or military service in Japan on account of his American nationality, nor did he claim any protection from the Government of the United States; nor did the Government of the United States offer any such person any protection.

He traveled under a Japanese passport, from the summer 1944 until Oct. 23, 1944. This was sufficient to place him under the protection of Japan.

Joyce v. Director of Public Prosecutions, 1946, A. C. 647;

Rex v. Joyce, 173 L. R. T. 377.

The defendant therefore expatriated himself by his election. There is no provision in Japanese law, any more than there is in American law, for a Japanese citizen to "naturalize" himself or "recitizenize" himself—if we may use that expression. He already is a citizen of Japan. This was conceded in the trial. How then may a citizen of Japan express his election to remain Japanese? By his voluntary acts and conduct and his intention.

U. S. C. Title 8, Sec. 807a;

United States v. Yasui, 48 Fed. Supp. 46.

Important things are set up in the Nationality Code which would indicate a clear election, such as voting in an election, joining the army of the enemy, taking an oath or making an affirmation, or other form of declaration of allegiance. These are not exclusive determinations. We contend that the construction which the Japanese Govern-

ment places upon the acts of its own citizens in the absence of a contrary showing is binding upon the United States as to what happened in Japan. It is the same as an Administrative determination of a fact.

Thus, Kawakita had his name entered in the family Koseki. This, according to the Attorney General of Japan, constituted a *reaffirmation* of his allegiance to Japan. It was the same as children born abroad of our own American citizens and declare their allegiance to the United States upon reaching majority; or, it is the same as a man being admitted to the practice of law, declaring to support the Constitution of the United States. It is a reaffirmation of an allegiance which already exists.

He changed his residence. After his name was entered into the family Koseki, the police department removed his name from the list of *aliens* and the Japanese construction of the act was that he was no longer an alien but a Japanese for all purposes, and that he could go about wherever he wished. These were contemporaneous construction by Japanese administrative officers that he had elected Japanese nationality. No Japanese law expert was placed on the stand by the Government to testify to the contrary. Kawakita was permitted to go to work in a defense area, in fact in a prisoner of war area, in which only Japanese could be permitted to go. He changed his address at the University, and his residence was thereafter always given as a Japanese residence. Japan gave him a Japanese passport to go to China, and regarded him as under its protection by reason of that fact.

These were all acts which clearly showed his intent to expatriate himself. (See excellent opinion of Judge Fee in *United States v. Yasui*, 48 Fed. Supp. 40.)

To restate:

Kawakita elected Japanese citizenship by his own voluntary acts and in various ways provided by the Nationality Act of 1940 and his election was expressed by his voluntary acts.

Thus, pursuant to Section 401 of the Nationality Code, 8 U. S. C. 801(a), he was the son of a Japanese National who had by his own voluntary act* failed to return within

*In the opinion in the *Ricketts* case (165 F. 2d 193), the court said:

"The provision does not undertake to specify what voluntary act or acts will amount to an expatriation. In that respect, the framers of the legislation seem to have been content to follow the not very precise verbiage of Chief Justice Hughes in *Perkins v. Elg*."

The language of Chief Justice Hughes in *Perkins v. Elg*, 83 L. Ed. at 1325, is as follows:

"To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice."

And the court quoted from Secretary Sherman, as follows:

"If such a party having thus become a recognized citizen of the United States, takes up his abode once more in his original country, and applies to be restored to his former citizenship, the government of the last named country is authorized to receive him again as a citizen, on such conditions as the said Government may think proper (Treaty of 1869, Article III). Or he may by residence in the country of origin, without intent to return to the United States, be held to have renounced his American citizenship (Protocol, May 26, 1869). But this presumption, like all presumptions of intent, may be rebutted by proof. . . .

* * * * *

"That in the latter case the child was not deemed to have lost his American citizenship by virtue of the terms of the statute but might still with reasonable promptness on attaining majority manifest his election is shown by the views expressed in the instructions issued under date of November 24, 1923, by the Department of State to the American Diplomatic and

two years from the effective date of the act, and had taken up permanent residence in Japan, having changed his address and taken up permanent residence in Japan. (See *Attorney General v. Ricketts*, 165 F. 2d 193.) This must be deemed to have been a determination on Kawakita's part to discontinue his status as an American. [See

Consular Officers. These instructions dealt with the questions arising under the citizenship act of March 2, 1907, and cases of *dual nationality*. It was stated that it was deemed desirable 'to inform diplomatic and consular officers of the department's conclusions, for their guidance in handling individual cases.'"

Commenting on dual nationality the instructions said:

"The term 'dual nationality' needs exact appreciation. It refers to the fact that two States make equal claim to the allegiance of an individual at the same time. Thus, one State may claim his allegiance because of his birth within its territory, and the other because at the time of his birth in foreign territory his parents were its nationals. The laws of the United States purport to clothe persons with American citizenship by virtue of both principles."

And after referring to the Fourteenth Amendment and the Act of February 10, 1855 (10 Stat. at L. 604, Chap. 71, Sec. 1), Rev. Stats., Sec. 1993; 8 U. S. C. A., Sec. 6, the instructions continued:

"It thus becomes important to note how far these differing claims of American nationality are fairly operative with respect to persons living abroad, whether they were born abroad or were born in the United States of alien parents and taken during minority to reside in the territory of States to which the parents owed allegiance. It is logical that, while the child remains or resides in territory of the foreign State claiming him as a national, the United States *should respect its claim to allegiance*. The important point to observe is that the doctrine of dual allegiance ceases, in American contemplation, to be fully applicable after the child has reached adult years. Thereafter two States may in fact claim him as a national. Those claims are not, however, regarded as of equal merit, because one of the States may then justly assert that his relationship to itself as a national is, by reason of circumstances that have arisen, inconsistent with, and reasonably superior to, any claim of allegiance asserted by any other State. *Ordinarily the State in which the individual retains his residence after attaining his majority has the superior claim.*" (Italics ours.)

Government's Exhibits 4, 6I and 6T.] Section 401(a) provides:

“(a) . . . *Provided further*, That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of this Act to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship; or (54 Stat. 1168-1169; 8 U. S. C. 801).”

And since he was estopped by law from claiming American citizenship, the government is estopped from claiming him to be an American citizen for the purpose of a treason prosecution, after a war veteran who once couldn't eat a nut or smoke a cigaret in a prisoner war camp, wanted to kill him when he saw him in the United States.

Kawakita had also reaffirmed his allegiance to Japan by having his name entered in the Koseki, the family registry. Section 401(b), Title 8, U. S. C. 801 of the Nationality Act, provides as follows:

“BY OATH OR AFFIRMATION OR OTHER DECLARATION OF ALLEGIANCE TO A FOREIGN STATE.

“(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or (54 Stat. 1169; 8 U. S. C. 801).”

And, Yoshio Suzuki, the Attorney General of Japan stated in his deposition [Exhibit A] as follows:

“Q. State specifically if this is the form and manner, or one of the forms and manner, in which a Japanese son, born of a parent in the United States who was born in Japan, and who came to Japan in 1939 and desired to become a Japanese national, which would permit one to make affirmation or other formal declaration of allegiance to Japan. In other words, is a request to a one's parents or relatives to enter one's name in the family register in Japan, a formal declaration of allegiance to Japan, or a formal declaration that one from that time on is to be a Japanese national under the laws of Japan as of March 8, 1943? A. In Japan, all Japanese Nationals are duty bound to Japanese allegiance. This is also true of those Japanese Nationals who are born in foreign countries of Japanese parents. The registration into the Family Register is not necessarily a formal declaration of allegiance but merely an reaffirmation of an allegiance to Japan which already exists.”

To reaffirm is to affirm again. It was done in a public office before a public registrar. One reregistering for election reaffirms. One getting a bar certificate or a passport reaffirms an allegiance.

(c) Kawakita had also conformed with the requirements of Title 801, Section 401, Subdivision (c), which provides as follows:

“BY ENTERING OR SERVING IN THE ARMED FORCES
OF A FOREIGN STATE.

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or (54 Stat. 1169; 8 U. S. C. 801)."

While Kawakita was not actually in uniform, he served as part of the armed forces in Camp Oeyama. He was drafted by the government. He was assigned to a military area. One does not actually have to be in uniform to be in the armed forces. Our own army has many civilians with the status of being in the armed forces. Acting as an interpreter for the armed forces in a prisoner of war camp operated under army regulations is a part of the armed forces. If the enemy had captured him, he would have been treated as a prisoner of war. Art. 3 of the next Regulation of the treaty of the Hague, entitled Treaty Series, No. 846, signed at Geneva, July 27, 1929, provides in the footnote: "The armed forces of the belligerent parties may consist of combatants and noncombatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war." (Page 39, Treaty Series, No. 846.) (And see *In re Territo*, 156 F. 2d 142.)

(d) Kawakita also accepted and performed the duties of a post and employment under the Government of Japan, for which only Nationals of Japan were eligible, namely, employment in the military confines of Camp Oeyama where only Japanese Nationals were permitted to act. Kawakita was asked by Mr. Mori, the president of the company, and his other employers whether he was a Japanese National and it was conceded that he was a Japanese National. He was only eligible for such employment because he was a Japanese National and therefore

came within the specific provisions of Section 401, Subdivision (d) of Title 801, which provides as follows:

“BY ACCEPTING OR PERFORMING DUTIES UNDER A FOREIGN STATE.

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such states are eligible, or (54 Stat. 1169; 8 U. S. C. 801).”

In *United States v. Minoru Yasui*, 48 Fed. Supp. 40, at 54, it was said by Judge Fee:

“Under the Constitution of the United States, Amend. 14, Sec. 1, Yasui, by virtue of his birth in the territorial limits of the United States and notwithstanding the fact that his parents were alien Japanese incapable of naturalization in the United States, had conferred upon him the inestimable right to citizenship in the United States. By international law, however, he was also a citizen of Japan and subject of the Emperor of Japan. According to international law, also, he had, upon attaining majority but not before, the right of election as to whether he would accept citizenship in the United States or give his allegiance to the Emperor to whom he was bound by race, the nativity of his parents and the subtle nuances of traditional mores engrained in his race by centuries of social discipline.

While, therefore, Congress might have set up tests or presumptions whereby the initiation or continuance of the relationship of citizenship in persons who held the dual status during minority might have been tested, as it has done in case of naturalized citizens, or might have permitted segregation until evidence of

citizenship were produced, no such intention is apparent in the legislation.

This election is a mental act. The choice which exists in the mind of a person is exemplified by acts. The intention, however, to make an election can be discovered by a tribunal as can criminal intent, knowledge or any other mental state. Notwithstanding the expression of some liberal authorities, tender in times of peace to preserve civil rights, such a mental state may be found in a criminal case contrary to the sworn evidence, protestations and declarations of a defendant."

Although the case was reversed in the Supreme Court upon other grounds, the law as set out by Judge Fee is clear and applicable to this appellant.

The Character of the Overt Acts Themselves.

We challenge the sufficiency of the overt acts because they are colorless as to intent and because they are insufficient as a matter of law as a giving of aid and comfort to the enemy. The acts themselves, in relation to the charge and the setting, are trivial and common place.

As said in *Cramer v. United States*, 325 U. S. 1 at 35:

"But in this and some cases we have cited where the sufficiency of the overt acts have been challenged because they were colorless as to intent, we are persuaded the reason intent was left in question was that the acts were really indecisive as a giving of aid and comfort. When we deal with acts that are trivial and commonplace and hence are doubtful as to whether they gave aid and comfort to the enemy, we are most put to it to find in other evidence a treacherous intent."

And, as said in *United States v. Stephan*, 50 Fed. Supp. 738, 743, approved in *Stephan v. United States*, 133 F. 2d 87, cert. denied 319 U. S. 781:

“Our forefathers did not want Congress to be able to take spitting in somebody’s face or anything of that kind, as being treason so they tell the congress itself what it is.”

Let us look at each of the overt acts. We have set out in the appendix a complete summary with page references to each witness as to each overt act. We may say by preliminary that the government did not urge in the trial that intent to betray could be gathered from any of the overt acts. They attempted to prove intent to betray from separate evidence. To this we will advert later.

The Insufficiency of the Overt Acts.

Preliminary to taking up each of the eight overt acts, we may specify that none of the allegations in the indictment, or the proof offered in support of those allegations was definite and specific. The dates were vague, general and conflicting. Times and places were at variance and no substantial evidence was offered that the acts alleged could not have taken place more than once or twice, or were not of such a nature that they could or did not occur more than once.

If it be said that the time of trial was long removed from the alleged dates of the occurrences, then it is the Government which was lax in the matter of bringing the allegations and charges timely and it must bear the consequences. This is not a case where there was a discovery of an alleged offense long after its occurrence. If it occurred at all, it occurred while all of the Americans

were in the camp, and in a period when there were at least 45 American officers present, and one American captain, a doctor, was at all times in charge of the camp and received reports of any physical occurrences to any of the men. He kept a complete diary and medical records. None of them contain a single report regarding Kawakita.

In charge of the Americans, and as the Japanese called him "So Hanchō," was the American Spy, Chief Counter-Intelligence Officer, Sergeant Montgomery.

Winthrop's Military Law and Precedents, Second Edition (Army Document 1001), page 776, says:

"ARREST AND RESTRAINT OF PERSONS. The Laws of War authorize the arrest, trial and punishment of such of our own people as may become chargeable with relieving or communicating with the enemy, carrying on illicit trade or intercourse, or other violation of those laws. The liability and disposition of such offenders has already been in part considered under the 45th and 46th Articles of War, and will be further discussed in treating of the jurisdiction and powers of the MILITARY COMMISSION. The restraints which may be exercised over the citizen will also enter into the consideration of the subject of MARTIAL LAW." (*Winthrop's Military Law and Precedents, Second Edition, page 776.*)

If any of these acts occurred as alleged, they occurred prior to the Americans taking over the camp. Immediately after the Americans took over, Major Martin (American) was placed in charge of the camp. The American flag was raised and Sgt. Montgomery became the non-commissioned officer in charge. Discipline followed.

If treason had occurred, it was then the duty of the American officers and men to arrest the defendant immedi-

ately. In fact, Title 18, Section 3, makes anyone who fails to report treason immediately guilty of misprision of treason.

Even the Japanese officers in charge of the Camp were placed under arrest a short time after the termination of the camp for so-called war crimes. But not the defendant.

Kawakita not only was about the camp daily, after the Americans took over, but assisted the American officers throughout in locating food, taking their parties on excursions, and finally in helping them to entrain. This is not the badge of treason, and if he were guilty of treason, the doctors and men would not be slow to express their personal animosity toward him, rather than have him accompany them, set up their prophylactic station, and be selected as the favorite interpreter for the purposes of locating food, explaining to civilians whose homes had been hit by the dropping of packages and babies injured, giving apologies, etc., and all the other things that the defendant did.

And, significant indeed, is the fact that he went to work in Japan thereafter. He did not seek immediate return to the United States, but was at all times available to the Americans while in Japan.

It was not until four months afterwards that he sought the advice and information from the American Consulate as to the possible status of returning to the United States, to continue his education in this country. Significantly enough, his address was at all times known to the American Consulate and he was thoroughly investigated by the Counter-Intelligence Corps, which gave a favorable report to the American Consulate at the time.

He did not leave Japan until August, 1946. He reported constantly to the Eighth Army in Japan.

Surely, if he was guilty of treason at a specific time and date, it was the duty of the American officers and men, as well as the Counter-Intelligence Corps of the Army and the American Consulate to have brought those charges forthwith.

Therefore, the failure to bring the charges, if they had any logical basis, at a time when the facts could actually be established with certainty and definiteness by the direct testimony of two witnesses was the responsibility of the Government, which it failed to exercise.

We shall talk about this more under our heading on the "Denial to the defendant of his Constitutional rights of Speedy Trial."

Coming now, however, to the lack of proof of overt acts by the testimony of two witnesses, we start out with the basic principle announced in *United States v. Robinson*, 259 Fed. 685, that the overt acts must be established by direct evidence of two witnesses to the entire or whole overt act.

And see also:

Cramer v. United States, 325 U. S. 1.

OVERT ACT (a) was the Toland incident. This act was as follows:

"(a) Defendant TOMOYA KAWAKITA, on a date in May, 1945, the exact date of which is to the grand jury unknown, at the said smelter operated by the company near Camp Oeyama, did direct the work of Phillip D. Toland, a member of the armed forces of the United States who was then and there a prisoner

of war, to compel him to remove rock from the road-bed and track of a railroad used in the operation of said smelter, and did kick the said Phillip D. Toland to compel him to greater exertion in said work.”

The work was directed by the military authorities, not by Kawakita.

Toland himself said that the alleged occurrence was June, 1945. He was unable to specify the exact date, he said it occurred in June, 1945. He put a mark on the blackboard with a “T” on Plaintiff’s Exhibit 25, which was different than the mark put there by other witnesses, and it was an entirely different location. The other witnesses said that it occurred some time in May, 1945. None of them had any specific date or time, or exact specification, nor did any of them establish that it was done to compel Toland to *greater* exertion.* Toland was not exerting himself at all at the time, according to his own testimony. According to Dr. LeMoyne Bleich, M. D., the only officer in charge of the men, Toland was then assigned “light duty” on the garden party and was not working at the smelter. Dr. Bleich’s daily card record so shows. [R. 3409] and had been since April 21, 1945, thus contradicting all the dates of the other witnesses.

*Philip Daniel Toland, in his statement to the Intelligence Corps, made on November 16, 1945, shortly after he returned to the United States and within a few months after he left Camp Oeyama, described one incident that allegedly occurred on August 1, 1945, in the morning, when according to his statement:

“I was not marking time and he called me by number in Japanese.”

He said he was then ordered out in front of the whole group and struck with the left hand of the guard, whose right arm was paralyzed, and he did not know or remember the name of the guard. He in nowise mentioned Kawakita [See Exhibit AG], nor any other incident at the camp to which is testified in this case.

The requirement of two direct witnesses is: "Two direct witnesses to the same occurrence, or some part of the same occurrence." Can anyone say that all these witnesses saw the same incident at the same time and same place, and on the same date, or at all? Surely the testimony leaves much to be desired—in fact, it is entirely lacking in substantial proof of all of these required elements to be the direct testimony of two witnesses, as required by the Constitution.

Haupt v. United States, 330 U. S. 630.

The evidence as to Overt Act (a) showed that Phillip D. Toland was a prisoner of war and that his work was being supervised and directed by the military authorities of Japan. Lt. Hazama was in charge, not Kawakita. The amount, quantity and duties of Toland were outlined by the military authorities. [R. 4064.]

The next incident was the Grant incident, which is OVERT ACT (b), as follows:

"(b) Defendant TOMOYA KAWAKITA, during the latter part of April, 1945, the exact date of which is to the grand jury unknown, at said Camp Oeyama did direct and participate in the following inhuman and degrading punishment of one, J. C. Grant, a member of the armed forces of the United States who was then and there a prisoner of war at said Camp Oeyama; said J. C. Grant was knocked into the drain or cesspool of said camp by his Japanese guards and was repeatedly and violently struck and beaten by the defendant and the said Japanese guards as he attempted to get out of the pool, thereby sustaining injuries, shock and exposure."

We have set out in our appendix a summary of the testimony with page references of each of the witnesses to each of the overt acts found by the jury.

The testimony was uncertain as to the date, time and place of the incident. Grant himself had gone through an experience of this kind twice for stealing. He did not identify the defendant as one of those who participated.

The whole of the overt act was not proved. The evidence is uncontradicted that Kawakita did not *direct* the punishment of Grant, but that it was directed by Sargeant Ichiba and Akamatsu.

The indictment does not state that Grant was a thief—stealing and burglarizing a storehouse in Japan. While our sense of fellow feeling for Americans may rise up against the use against even a thief of this old “ducking stool” method—once used in the United States for punishing gossiping women who talked too much, nevertheless the proof is lacking that Kawakita *directed* any inhuman or degrading punishment of Grant, or that Kawakita knocked Grant into the drain or cesspool, or that Kawakita was responsible for Grant sustaining any injuries. Dr. Bleich, who was nearby at the time and advised Grant to move about in the pool, did not see Kawakita, and the evidence is entirely lacking by the testimony of two witnesses that this occurred, on a particular date or time, in April, 1945, or that it occurred only once. Grant was questioned after the war on war crimes and did not mention Kawakita in his statement. Furthermore, Grant received no other punishment, although for this type of burglary, even in this country, he might have been imprisoned at hard labor for four years—and, in Japan the Regulations

governing the prisoner of war camp called for as much punishment as death.

Furthermore, on March 1, 1945, Kawakita was assigned to work as a clerk in the warehouse, and was in charge of clerical work in the warehouse and was not an interpreter in the camp. [R. 4099.] Kawakita denied the act charged and Grant himself did not identify the defendant as participating.

OVERT ACT C.

Overt Act (c) sets forth the third overt act found by the jury, as follows:

“(c) During December, 1944, at Camp Oeyama, on a date to the grand jury unknown, the defendant TOMOYA KAWAKITA and the Japanese guards did line up about thirty members of the armed forces of the United States who were then and there prisoners of war in Camp Oeyama and as punishment of said prisoners of war for making mittens and shoe linings from pieces of blankets for protection from cold weather conditions and did at said time and place strike and beat them and force them to strike and beat each other.”

Again, this overt act is a justification for American prisoners of war destroying Government property. The evidence is entirely insufficient to show that Tomoya Kawakita “did line up about thirty members of the armed forces of the United States.” The punishment for the wilful destruction of Government property was decreed by Lt. Hazama and Sgt. Ichiba and Akamatsu, Kawakita did not line up any of the prisoners of war and, of course, they were not *members* of the armed forces but were disarmed forces.

Kawakita did not provide the punishment and there is no proof that the making of the mittens, or any use of cutting up a government property illegally was necessary as protection from cold weather.

There is no evidence by two witnesses that he did strike any one person, or beat any one person, or that he forced any one to strike another person or beat another person. The orders were all a part of the Military.

Kawakita, then working as a warehouse clerk, denied any participation.

OVERT ACT D.

Overt Act (d) charged Kawakita, in August, 1945, as follows:

“(d) During August, 1945, the exact date of which to the grand jury is unknown, the defendant TOMOYA KAWAKITA, at Camp Oeyama, did impose punishment on one Thomas J. O’Connor, a member of the armed forces of the United States and then and there a prisoner of war in said camp, for a breach of camp rules by assaulting, striking, and beating said Thomas J. O’Connor and repeatedly knocking him into the drain or cesspool of the said camp, causing the said Thomas J. O’Connor temporarily to lose his reason.”

Proof as to this overt act was also insufficient. O’Connor at no time said Kawakita participated in punishing him for a breach of the camp rules in August, 1945. [R. 5261-2.] Nor was there any reference to Kawakita in his report to the Navy investigating war crimes after the close of the war. Dr. Bleich’s records reveal no report of Kawakita. The men generally described Ichiba and Akamatsu

as being the ones who punished O'Connor after he was caught stealing. Dr. Bleich's record shows Sgt. Ichiba, Akamatsu and Corp. Kondo. No mention is made of Kawakita.*

The Insufficiency of Overt Act (g).

Overt Act (g) is as follows:

"(g) On a date in July or August, 1945, the exact date of which is to the grand jury unknown, a work detail consisting of members of the armed forces of the United States who were then and there prisoners of war at said Camp Oeyama, including in their number one David R. Carrier and George W. Simpson, returned thirty minutes early from their assigned

*In his statement for the War Crimes Office, Thomas J. O'Connor, on August 26, 1946, said that in relation to the incident alleged in the indictment:

"Q. Did you receive any other beating while at this camp?
A. Yes. Around 1 August 1945, I broke into a Japanese warehouse with two other men. I escaped, but the other two were caught and beaten so badly that I confessed my part in the affair. The Japanese then ceased beating the other men and concentrated their efforts on me. . . .

Q. Can you identify or name any of the Japanese responsible for this incident? A. Yes, I was beaten by the two Sergeants at the Camp—Ichiba Goonsaw (1st Sgt.) and Akomatsu Goonsaw (Sgt.) . . .

Q. Who do you think was responsible for these conditions?
A. The Camp Commander. . . .

Q. Can you name or otherwise identify any of the Japanese officials at this camp? A. No. I don't recall the name of the camp commander. A man by the name of Marista San was in charge of the galley."

O'Connor also described an incident that allegedly occurred while Kawakita was in China, to-wit, in the middle of August, regarding a Private in the Marine Corps named Killer (nicknamed Foghorn), "who was punished for eating a radish and" the rough treatment resulted in his death two weeks later. There is no such record. The records of the camp and the testimony of Dr. Bleich did not reveal any such alleged occurrence. [See Exhibit AK.]

duties as such prisoners of war and were compelled by the Japanese sergeant in charge to run twice around the inner quadrangle of the building of said camp and thereafter the defendant TOMOYA KAWAKITA did compel the said David R. Carrier and George W. Simpson, who were unable to run fast enough by reason of illness resulting from their captivity, to run an additional four times and six times respectively around said quadrangle of said camp."

The act itself alleges two different dates in 1945. Neither date was established nor any specific date was established by any or all of the witnesses, or two direct witnesses to the same overt act. The constitutional requirement means two persons who saw the whole of the same act or such portion of the act. The evidence did not show that there was a work detail consisting of members of the armed forces—but there was a detail of disarmed forces. There was no proof that Tomoya Kawakita *did compel* David R. Carrier and George W. Simpson to run an additional four times and six times respectively around the quadrangle of said camp, but said compulsion, according to the testimony, was by the Japanese Sergeant who also stopped the running around the compound. [R. 281.] Kawakita at no time compelled either men to run additional times and that was ordered by the Sergeant. Nor is there any proof by any authorized authority qualified to testify that they were "unable to run fast enough by reason of illness." Dr. Bleich did not testify to that effect and the testimony of the men themselves is that they did run around the quadrangle. Furthermore, this transaction was allegedly

punishment for violation of a rule of camp, directly under the military authority. According to the testimony of one witness, running around the compound is a mild form of military punishment and used to be common strict discipline for breach of the camp rules in the United States army also.

The Insufficiency of Overt Act (i).

Overt Act (i) alleged as follows:

“(i) That on or about December 17, 1944, at or near the said open pit ore mine, the defendant, TOMOYA KAWAKITA, did order and compel Johnie T. Carter, then and there a member of the armed forces of the United States and a prisoner of war at Camp Oeyama, to carry a heavy log up an ice-covered slope that the said Johnie T. Carter, who was then and there suffering from malnutrition and in a weakened physical condition, slipped and fell and received a serious spinal injury; that the defendant, TOMOYA KAWAKITA, then and there denied medical care to the said Johnie T. Carter and delayed his removal to Camp Oeyama for a period of approximately five hours.”

There is no proof of any credible witness and the evidence does not establish that Kawakita “ordered and compelled Carter to carry a heavy log up an ice-covered slope” but that Carter was under orders of the Military to carry the log. There is no evidence that Carter was suffering from malnutrition and in a weakened condition, when he slipped and fell, other than those similar to all the prisoners who were working. There is no evidence that Kawakita denied medical care to the said Johnie T. Car-

ter, nor that he delayed his removal to Camp Oeyama for a period of approximately five hours.

Carter, who was injured, was not moved and it is said to be good medical technique not to move a man in his condition except by competent medical orderlies or persons familiar with the possible injury. There is no evidence that any medical orderlies were immediately available. One witness testified that Kawakita said he would have the medical orderlies take him. There is no evidence that there were any facilities to remove Carter back to the camp before the time that he was actually moved on the trains regularly going back to the camp where he received medical attention.

The Insufficiency of Overt Act (j).

Overt Act (j) is as follows:

“(j) On a date in May, 1945, the exact date of which is to the grand jury unknown, the defendant TOMOYA KAWAKITA, at a warehouse near Camp Oeyama, did order and command John J. Armellino, a member of the armed forces of the United States, who was then and there a prisoner of war at said Camp Oeyama, and weak and emaciated, to carry for a distance of approximately 500 feet two heavy buckets of white lead instead of one bucket which Armellino had been carrying, and did then and there strike and beat the said John J. Armellino in order to compel him to perform this labor.”

There is no evidence that Kawakita ordered and commanded Armellino to carry the paint, but there were apparently orders for *all prisoners of war to carry two buckets of paint* and Armellino was not carrying out the order. There is no evidence that Armellino was a member

of the armed forces but was a disarmed member of the work battalion. There is no evidence that Armellino was weak and emaciated any different than any other prisoners of war. There is no credible evidence that Kawakita struck Armellino in order to compel him to perform this labor, which he was required in any event to perform.

The Insufficiency of Overt Act (k).

Overt Act (k) charges as follows:

“(k) That on a date in the late spring or early summer of 1945, the exact date of which is to the grand jury unknown, the defendant, TOMOYA KAWAKITA, within the confines of Camp Oeyama, did participate in and assist Japanese military personnel of Camp Oeyama in directing and executing the following cruel, inhuman, and degrading punishment of Woodrow T. Shaffer, a member of the armed forces of the United States who was then and there a prisoner of war of the Japanese government at Camp Oeyama, to-wit, the said Woodrow T. Shaffer was forced to kneel for several hours on a platform with a stick of bamboo placed on the inner side of the joints of his knees and to hold at arms length above his head a bucket of water and subsequently a heavy log, and was then and there struck and beaten by the said TOMOYA KAWAKITA,”

There is no exact date specified. Shaffer stole beans—a most serious infraction of the laws of Japan and the camp rules and regulations. He admitted his crime to the Japanese Military which imposed the punishment. There is

no evidence that Shaffer was a member of the armed forces but was a member of the work battalion. The evidence is that the Military personnel caused him to kneel and it was the Military personnel who carried out the punishment of Shaffer for his serious infraction of the rules of the Military personnel.

There Were No Two Direct Witnesses of a Clear and Convincing Nature to the Same Overt Acts.

Dates were uncertain, the surroundings and the circumstances were uncertain and each of the acts could have been committed—if they were committed at all—on more than one occasion.

Sgt. Montgomery, although an intelligence officer for the army, could not at the date of trial even recall the name of the American officer in charge of the camp after the Americans took over—although that officer was in charge for practically a month in the camp [R. 358], and he wasn't even sure of the name of the camp captain [R. 359] who was camp adjutant, and he wasn't sure whether a roll call was held. [R. 359.]

Photographs were obtained from Japan by the defense counsel of the Japanese officer [Lt. Hazama, nick-named "The Pig," Ex. B], Sgts. Ichiba [Ex. C] and Akamatsu [Ex. D], the active Japanese non-commissioned officers in charge. Corporal Kondo, and two photographs [Exs. H and I] of American and British and Canadian officers and men taken at Camp Oeyama at the close of hostilities.

Sgt. Montgomery, a trained investigator could not identify the individuals in the picture. See reverse side of Exhibit H. He was allowed to study the photographs

during the noon recess and the writing was his own comment and testimony. On Exhibit "I" he was only able to identify two named persons.

Of the Japanese personnel most of the witnesses were not even able to identify Lt. Hazama whom they disaffectionately named "The Pig"—until his picture and identification was published in a Los Angeles newspaper and the witnesses were stopping at the Hotel Northern in Los Angeles and discussing the testimony and pictures amongst themselves. [R. 394, 406.]

The case of treason stands upon a peculiar ground; there the overt acts must by statute be specially laid, and must be proved as laid.

United States v. Gooding, 12 Wheat. (25 U. S. 473, 475);

United States v. Wilson, 28 Fed. Case No. 16,730,-699,718;

United States v. Robinson, 259 Fed. 685;

Ex parte Bollman, 8 U. S. 75;

Cramer v. United States, 325 U. S. 1;

Haupt v. United States, 330 U. S. 631.

This the government failed to do.

* * *

The eight overt acts found by the jury were trivial in and of themselves in connection with the broad aspect of the crime of treason, and should not, of themselves, constitute treasonous acts.

Overt Act (a) was a charge of kicking Phillip D. Toland to cause him to greater exertion in his work. This,

if true, would be no more than a petty battery, which, if true, would call only for a fine of \$25. It was conceded that the American prisoners of war were all trying to do as little work as possible, and this happening—if it did occur—was not treasonous.

Of the eight acts found by the jury, two were with the objective of causing exertion on the part of those not exerting themselves; one was in not moving a man to the camp medical facilities for a period of five hours, from the mine when good medical technique says he should not be moved except by experienced medical corps men; and five acts were allegedly in aid of the military in carrying out punishments for theft of rationed and scarce articles and in breaking into the government storehouse.

What constitutes treasonous acts has been many times stated as, “by surrendering a castle of the King for reward, or selling the enemy guns, or assisting the King’s enemies, furnishing rebels or enemies with money, arms, ammunition or other necessities, will *prima facie* make a man a traitor.”

Foster Crown Cases, found in 792 chapter 3, sec. 8, page 216.

See:

United States v. Robinson, 259 Fed. 685;

Ex parte Bollman, 4 Cranch 75, 2 L. Ed. 554;

Cramer v. United States, 325 U. S. 1.

As stated by Chief Justice Marshall, in *Ex parte Bollman*, 4 Cranch 75, 8 L. Ed. 554:

“To prevent the possibility of those calamities which result from the extension of treason to offenses of minor importance, that great fundamental law

which defines and limits the various departments of our government has given a rule on the subject both to the legislature and to the courts of America, which neither can be permitted to transcend . . . It is, therefore, more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide.”

In *Cramer v. United States*, 325 U. S. page 1, at page 34, the court said:

“It is obvious that the function we ascribe to the overt act is significant chiefly because it measures the two-witness rule protection to the accused and its handicap to the prosecution. If the overt act or acts must go all the way to make out the complete treason, the defendant is protected at all points by the two-witness requirement. If the act may be an insignificant one, then the constitutional safeguards are shrunk so as to be applicable only at a point where they are least needed.

The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its settings, to sustain a finding that the accused actually gave aid and comfort to the enemy. Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses. The two-witness principle is to interdict imputation of incriminating acts to the accused by circumstantial evidence or by the testimony of a single wit-

ness. The prosecution cannot rely on evidence which does not meet the constitutional test for overt acts to create any inference that the accused did other acts or did something more than was shown in the overt act, in order to make a giving of aid and comfort to the enemy. The words of the Constitution were chosen, not to make it hard to prove merely routine and everyday acts, but to make the proof of acts that convict of treason as sure as trial processes may . . . The Government is not prevented from making a strong case; it is denied a conviction on a weak one.

It may be that in some cases *the overt acts*, sufficient to prove giving of aid and comfort, will fall short of showing *intent* to betray and that questions will then be raised as to permissible methods of proof that we do not reach in this case. But in this and some cases we have cited where the sufficiency of the overt acts has been challenged because they were colorless as to intent, we are persuaded the reason intent was left in question was that the acts were really indecisive as a *giving of aid and comfort*. When we deal with acts that are trivial and commonplace and hence are doubtful as to whether they gave aid and comfort to the enemy, we are most put to it to find in other evidence a treacherous intent."

The essential elements of the crime charged are that Kawakita: (1) with intent to betray (treasonable intent); (2) gave (a) aid and (b) comfort to the enemy.

It is well established that the overt act and the intent are separate and distinct elements of the crime of treason under the Constitution of the United States.

In *Cramer v. United States*, 325 U. S. 1, at page 54, it is stated:

“It is well established that the overt act and the intent are separate and distinct elements of the crime of treason under the Constitution. See *Ex parte Bollman*, 4 Cranch (U. S.) 75, 126, 2 L. Ed. 554, 571; *United States v. Burr*, 4 Cranch (U. S.) 455, 2 L. Ed. 677, Fed. Cas. No. 14,1692a; *United States v. Lee*, 2 Cranch (C. C.) 104, Fed. Cas. No. 15,584; *United States v. Vigol*, 2 Dall. (Pa.) 346, 1 L. Ed. 409, Fed. Cas. No. 16,621; *United States v. Hanway* (C. C.) 2 Wall. Jr. 139, Fed. Cas. No. 15,299; *United States v. Greiner* (D. C.), 4 Phila. 396, Fed. Cas. 15,262; *United States v. Greathouse*, 2 Abb. (U. S.) 364, 4 Sawy. 457, Fed. Cas. No. 15,254; *United States v. Werner* (D. C.) 247 F. 709, 710; *United States v. Fricke* (D. C.) 259 F. 673, 677; *United States v. Robinson* (D. C.), 259 F. 685, 690; *United States v. Stephan* (D. C.), 50 F. Supp. 738, 742, 743, affirmed (C. C. A. 6th), 133 F. (2d) 87, 99. Chief Justice Marshall ruled in *United States v. Burr* (C. C.), Fed. Cas. No. 14,692h, that it was in the discretion of the prosecutor to present evidence of the intent before proof of an overt act. And see *United States v. Lee*, 2 Cranch (C. C.) 104, Fed. Cas. No. 15,584, *supra*.”

See also:

Haupt v. United States, 330 U. S. 631.

Acts innocent on their face must be judged in the light of their purpose and of related events. Unless they be *acts of aid and comfort, committed with treasonable purpose*, there is no intent to betray.

The prosecution in this case did not rely on the overt acts to establish the treason itself. Two of the overt acts which the jury found were acts in which the men were not doing the required amount of work under the established quota, although it must be admitted that they were malingering or stalling. If Phillip Toland was not doing enough work, and was kicked in the leg, to compel him to do more work, to come up within the standard required by those in charge of the camp, this could not be said to be done with any treasonable purpose; nor could the failure to have Carter removed to camp for medical treatment by one not a medical attendant specially be deemed an act which in itself was treasonous.

The other five acts were acts of aiding the Military in carrying out punishment for stealing or destroying government property, or for violating other regulations of the camp. There was nothing on the face of any of these acts which were treasonable in their character.

What other testimony was there, then, to show an intent to betray the United States of America? Testimony unrelated to the overt acts was introduced by Sgt. Montgomery that the defendant had berated General MacArthur for leaving the Philippine Islands in advance of his men. This surely did not show a treasonable intent, nor

that any of the overt acts were committed because the defendant thought that General MacArthur had left his troops in advance. In fact, the Chicago Tribune and many others had criticized General MacArthur, and such criticism does not constitute evidence of treasonable intent, in furtherance of which the overt acts must have been committed. (See Readers Digest of January, 1946.)

It was not contended by the Government that Kawakita kicked Toland to make him do more work according to the quota established because General MacArthur had left the Philippine Island in advance of his men.

The other evidences of treasonable intent was likewise lacking in that quality with which the designers of our Constitution created this one and only crime as a part of the Constitution, with its safeguards.

Cramer v. United States, 325 U. S. 1.

As said in *Cramer v. United States*, 325 U. S. 1:

“But to make treason, the defendant not only must intend the act but he must intend to betray his country by means of the acts.”

Nowhere in the entire record of 43 volumes is there one word of evidence expressed by the defendant, word or deed, that any of the eight overt acts committed by him, were committed with *intent to betray* the United States by means of the acts.

The Overt Acts and Each of Them Are in No Manner
in Furtherance of the Crime of Treason.

None of the overt acts in the case at bar are in any manner in furtherance of the crime of treason.

In the footnote of *Cramer v. United States*, 325 U. S. 1, 7, the court says, quoting from *United States v. Fricke*:

“An overt act in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime.”

In footnote 7, it says:

“An overt act, in criminal law, is an outward act done in pursuance and in manifestation of an intent or design; an overt act in this case means some physical action done for the purpose of carrying out or affecting [*sic*] the reason.” (*United States v. Haupt*, 47 Fed. Supp. 836, 839.)

“The overt act is the doing of some actual act, looking toward the accomplishment of the crime.” (*United States v. Stephan*, 50 Fed. Supp. 738, 742, 743.)

The eight acts which the jury found in this case were in no wise in furtherance of any of the crimes of treason:

Kicking Phillip D. Toland in order to compel him to work which he was temporarily not doing, was in no wise an act in furtherance of treason;

Assisting military—if it occurred—in meting out punishment for theft, for destroying government property, was in no wise in furtherance of any treason;

Assisting the military—if it occurred—in causing the men to punish each other was in no wise in furtherance of treason, nor

Causing a man to carry an extra bucket of paint, or to run around the compound for returning from work earlier, anywise in furtherance of treason.

Treason is the betrayal of one's country, not making one work or carry an extra bucket of paint, or get punished summarily for theft or cutting up government property, or otherwise disobeying internal rules in a prisoner of war camp. The very statement of the case seems to be a complete answer to the argument that this could be treason.

The trial court not only held it to be treason, but made the most of it—the death penalty.

Two things are necessary to be established beyond a reasonable doubt under the constitutional definition of treason. They are both "aid" and "comfort." The Constitution sets them out in the conjunctive. Both are necessary. In the law of search and seizure it is said they are separate.

Although one might aid another without his knowing it, the word comfort pays a connotation of knowledge on the part of the recipient of the comfort that he is being comforted. Each and both are necessary to make out a case of treason.

It is difficult to conceive any aid and comfort to the Government of Japan in causing a soldier to do work that he is required to do, or in aiding the military in enforcing required discipline.

It was held in *Pryor*, Federal Case No. 16095, 2 Biff. 344 that the mere going ashore from an enemy vessel on which defendant was a prisoner, although with intent to procure provisions for the use of the enemy, does not constitute treason.

Likewise, in *United States v. Fricke*, 259 Fed. 673, it was held that assistance to an alien enemy known to be such, intended only as aid to him as an individual, is not aiding and comforting enemies of the United States within the meaning of this section.

The constitutional definition of treason leaves no room for Congress to extend or limit the definition, and limits the power of Congress over such subjects to prescribing the punishment. (*United States v. Greathous*, Fed. Cas. No. 15254, 4 Sawyer 457, 2 A. BBUs 364.)

We cannot conceive under any of the facts of this case how any of the acts charged herein either strengthened or tended to strengthen Japan and either weakened or tended to weaken the United States of America in its actual conduct of the war.

We would be very much shocked that Japan, even if it had known of the acts which has been charged, to have awarded Tomoya Kawakita an "E" for helping win the war, or that Hirohito would bestow his blessing on him for any of the things charged here. And every soldier of the United States who helped to win the war would resent the thought that these acts intended to help the Government of Japan to the extent of helping them win the war.

Lack of Proof of the Evidence of Aid and Comfort.

As said in *Cramer v. United States*:

“Of course the overt acts of aid and comfort must be intentional as distinguished from mere negligence or undesigned ones. Intent in that limited sense is not an issue here. But, to make treason, the defendant not only must *intend* the *acts* but he must intend *to betray* his country by means of the acts.”

Like Cramer, it is here that Kawakita defends. A re-examination of the entire evidence shows no intent to betray the United States by means of any of the acts alleged in the indictment.

We have pointed out all the acts in their setting heretofore. We have set out in the appendix the summary of the evidence offered by the Government on the question of intent to betray. We challenge the Government to point to any act which shows that Kawakita intended to betray the United States by means of any of the acts alleged. After three months of trial, they failed to prove that Kawakita was a traitor to the United States. They cannot point to a single alleged overt act found by the jury that was giving *aid* and *comfort*.

Treason as defined in the Constitution is restricted “to cases where also there was conduct which was ‘giving them aid and comfort.’” The word “comfort” connotes knowledge on the part of the Government in whose behalf the betrayal occurred. This is entirely absent in the present case.

“‘Aid and Comfort’ was defined by Lord Reading in the Casement trial comprehensively, as it should be, and yet probably with as much precision as the nature of the matter will permit: ‘. . . an act which

strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, that is in law the giving of aid and comfort' and 'an act which weakens or tends to weaken the power of the King and of the country . . . is . . . giving of aid and comfort.' ”

Cramer v. United States, 325 U. S. 1, pp. 28, 29.

Clearly the act must show something toward treason. It must show aid and comfort. (*Cramer v. United States*, 325 U. S. 29, 30.) Aiding the Japanese Military Authority to render summary punishment for burglary, theft and destruction of government property by prisoners in a disarmed labor battalion, and compelling a person not temporarily working to work, and using one's own discretion as to the time to return an injured person to a prisoner of war camp for medical treatment could not weaken, or tend to weaken, the United States to resist or attack the enemies of the United States, nor could it tend to strengthen Japan in the conduct of the war against the United States. There was no aid and comfort to Japan.

By International Law and the treaties between the United States and Japan the prisoners of war were then disarmed laborers in the camp and within the power of the enemy. There could be no aid and comfort in this setting. There was no intent and purpose to strike at the United States in any of the acts charged.

“Environment illuminates the meaning of acts, as context does that of words.”

Cramer v. United States, 325 U. S. 33.

“If the act may be an insignificant one, then the constitutional safeguards are shrunk so as to be applicable only at a point where they are least needed.”

Cramer v. United States, 325 U. S. 34.

To quote the language of *Cramer v. United States*, recording from *Ex parte Bollman*, 4 Cranch. 75, at 125, 127:

“The crime of treason should not be extended by construction to doubtful cases.”

Lack of Aid and Comfort of the Degree Constituting Treason.

There could be both aid and comfort to Japan and still be no treason. Thus the acts of Dr. Bleich, the senior American doctor in the camp may have given both aid and comfort to Japan. He treated not only Americans but he treated Japanese, and by his presence as a doctor in the Camp, if the theory of the Government is to be followed, there was one less Japanese doctor required on account of his presence and his work there, and treating ill Japanese personnel might have been of some “aid” to Japan. Certainly it was not treasonable. Thus, he may have given aid and comfort, but there was no treason in this for there was no intent to betray.

As said in *Cramer v. United States*, 325 U. S. 1:

“If there is no intent to betray there is no treason.”

Cases of adhering to the enemy are not many. Only eleven reported cases existed under our Constitution. Since that time, two cases have gone to the Supreme

Court of the United States, to-wit: *Cramer v. United States*, 325 U. S. 1, and *Haupt v. United States*, 330 U. S. 630. The *Cramer* and the *Haupt* cases grew out of alleged aid to known enemy agents who came here on a mission of sabotage. They had harbored and sheltered, according to the allegations, saboteurs and concealed their money after they had landed here on a subversive mission. Cramer's case was reversed on the insufficient proof by two witnesses because the court found that the act which two witnesses saw could not on their testimony be said to have given assistance or comfort to anyone—whether it was done treacherously or not. (Opinion of Justice Jackson, 330 U. S. 633, 635, in commenting on the *Cramer* case.)

The court said, also, in *Haupt v. United States*, 330 U. S. 634:

“We have held that the minimum function of the overt act in a treason prosecution is that it shows action by the accused which really was aid and comfort to the enemy. (*Cramer v. United States*, 325 U. S. 1, 34, 89 L. Ed. 1441, 1469, 65 S. Ct. 918.) This is a separate inquiry from that as to whether the acts were done because of adherence to the enemy, for acts helpful to the enemy may nevertheless be innocent of treasonable character.”

We submit that an examination of this entire record shows the lack of such acts being of any treasonable character.

The other treason case of adhering was that of *Stephan v. United States*, 133 F. 2d 87 (6th Cir., 1943), 318 U. S. 781, 783, 319 U. S. 783.

Justice Learned Hand said, in *United States v. Robinson*, 259 Fed. 685 at 690:

“Nevertheless a question may indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent Therefore I have the gravest doubt of the sufficiency of the first and second overt acts of the first count and of those of the second count, which consist of acts that do not openly manifest any treason. Their traitorous character depends upon a covert design, and as such it is difficult for me to see how they can conform to the requirements.”

For other cases of adherence to the enemy, see *United States v. Werner*, 247 Fed. 708; *United States v. Haupt*, 47 Fed. Supp. 836, 839, Append. 136 F. 2d 661; *United States v. Stephan*, 30 Fed. Supp. 738, 742, Append. 133 F. 2d 87, 89, and unreported opinion of Judge Clancey in *United States v. Werner*, So. Dist. of N. Y. 1943, and the recent series of *Broadcast* cases. One of which reached the Circuit Court of Appeals and was not reviewed by the Supreme Court of the United States, to-wit, *Chandler v. United States*, 171 F. 2d 685.

Insufficiency of the Evidence of Intent to Betray.

Paragraph (5) of the indictment charges:

“The said defendant Tomoya Kawakita, in the prosecution, performance, and execution of said treason and of said unlawful, traitorous, and treasonable adhering and giving aid and comfort to the enemies of the United States aforesaid” did the acts “unlawfully, feloniously, traitorously, and treasonably, *and with treasonable intent* to adhere to and give aid and comfort to said enemies.”

This allegation in the indictment is a pure imaginary conclusion.

There is not one word of support in the evidence of “intent” to betray.

We have set out in the appendix all of the evidence which the government produced with reference to *intent to betray*.

This evidence is isolated, disconnected and in no sense establishes any intent to betray the United States.

What Is Intent to Betray?

Judas Iscariot betrayed Christ for thirty pieces of silver. Brutus betrayed Julius Caesar; Benedict Arnold betrayed the Colonial Armies to the British. Giving money, food or military intelligence to the enemy have shown intent to betray, and broadcasting propaganda for the enemy by the American citizens for the purpose of weakening his own country and insuring the enemy of success has been held in more recent cases to evidence an intent to betray. (See *Chandler v. United States*, 171 F. 2d 685.)

But, none of the acts charged in this case, borrowing an expression from the law of negligence, show in and of themselves any *proximate cause* or *relationship* with any intent to betray. The testimony relates to conversations and alleged acts which are isolated, disconnected and inflammatory. There must be a treasonable project and the accused must have committed the overt acts with the knowledge or understanding of its treasonable character.

Cramer v. United States, 325 U. S. 35, also 60.

The prosecution cannot rely on evidence which does not meet the constitutional test of intent to betray to create an inference that the accused did other acts, or did something more than was shown in the overt acts, to constitute *betrayal*.

In *Cramer v. United States*, 325 U. S. 1 at page 35, the court said:

“It may be that in some cases the overt acts, sufficient to prove giving of aid and comfort, will fall short of showing intent to betray and that questions will then be raised as to permissible methods of proof that we do not reach in this case. But in this and some cases we have cited where the sufficiency of the overt acts has been challenged because they were colorless as to intent, we are persuaded the reason intent was left in question was that the acts were really indecisive as to giving of aid and comfort. When we deal with acts that are *trivial* and *commonplace* and hence are doubtful as to whether they gave aid and comfort to the enemy, *we are most put to it to find in other evidence a treacherous intent.*”

In examining all the other evidence, we confidently assert that there is no evidence therein of any treacherous intent.

The element of treasonable intent is an element separate from the overt act which may be proved by any relevant evidence as reaffirmed in the *Cramer* decision.

Cramer v. United States, 325 U. S. 1, 31, 89 L. Ed. 1459;

Haupt v. United States, 330 U. S. 630.

Treasonable intent must be a specific intent to betray the United States of America. There is no such proof in this entire record. During the long deliberation of the jurors—on the sixth day—one of the jurors asked the trial judge to define the word “betray.” The court gave the jury a haphazard definition which he himself designated as unsatisfactory. The defense counsel thereupon offered a dictionary definition of the word “betray.” The court declined to give it. [Clk. Tr. p. 284.] This showed that the jury itself was floundering with the question of treasonable intent.

In *Haupt v. United States*, 300 U. S. at page 645, Mr. Justice Douglas said:

“As the *Cramer* case makes plain, the overt act and the intent with which it is done are separate and distinct elements of the crime.

“For proof of treasonable intent in the doing of the overt act necessarily involves proof that the accused committed the overt act with the knowledge or understanding of its treasonable character.”

The record in this case is not only silent as to any proof of any treasonable intent, the record is affirmatively a com-

plete showing that the accused had no knowledge or understanding of any treasonable character of any act allegedly committed by him.

As we examine the overt acts in their setting, we can well understand why they lack such a character. Men confined in the camp were not soldiers any longer in any practical sense, they were prisoners of war and as Sergeant Montgomery said, "a labor battalion." International law was local law and rules and regulations adopted in the form of mutual treaties between the two countries made these prisoners of war nothing more than prisoners in an actual sense as well as in a military sense. They were placed in a confined area; military or prison guards were placed over them; they were required to obey these prison rules and regulations; they were required to salute the guards; they arose and obeyed in military fashion all of the commands of their superiors, the country which held them within its power under the terms of the Hague treaty.

The overt acts, and each of them, in this setting showed no character of treasonable intent.

Phillip Toland, overt act A, by his own admission was not working, for about three minutes he had stood without doing any work. He had been approved by the doctor for work as was customary to approve all persons before they were sent out to work which approval was by the American doctor. He made no complaint of his failure to be able to work, nor did he ask to be relieved from it. The alleged act of kicking him which had occurred, therefore, was not of a character that bore any relationship to any treasonable intent such as we have always under-

stood, in intent to betray such as sending information or intelligence to the enemy.

As Justice Douglas said:

“The requirement of an overt act is to make certain a *treasonable project* as moved from the realm of thought into the realm of action. *Haupt v. United States*, 330 U. S. 645.”

That requirement has not been met in the present case. There was no treasonable project either in thought or action. The second overt act was punishment of Grant for burglary and theft.

The next incident was the Carter incident, where Carter fell and hurt himself while on a log carrying detail. It happened in the afternoon, and it was said that Kawakita did not permit Carter to be taken forthwith back to the camp for medical treatment. He was taken back at 5:00 o'clock in the afternoon on the usual train which took prisoners of war back to the camp. While there is a wide difference of opinion or evidence regarding what actually happened, the Government failed to prove that there was any train available to take him back, or that he could not be taken to the Mining Hospital, which was located nearby, or that, as a matter of fact, it was proper to move a person who might have had a bone injury until there were proper facilities for moving him.

In any event, there was certainly nothing treasonable to the United States in the character of this act, if it occurred; and the matter of the delay of a few hours in his transportation, if it occurred, could not convert this alleged failure to act into an act of treason.

Every day we have on our streets people who are injured in automobile accidents and have them lie there for

a long time before police ambulances arrive. Policemen stop other people from picking them up, or transferring them until they have the proper facilities and the properly equipped person to move them. No medical or expert testimony was offered to show that Carter was not handled exactly right even from a medical standpoint. Certainly lay men were not qualified.

There certainly was nothing treasonable in the character of this alleged overt act, and nothing which showed any treasonable intent.

Nor could treason be garnered from having a man carry an extra bucket of paint. There was certainly nothing treasonable in this act.

The other five alleged overt acts were allegedly assisting the military authorities in carrying out the punishments for admitted thefts and crimes, destruction of government property in the prisoner of war camp itself.

None of the punishments were ordered by Kawakita. At some of them he was not present at the outset and it is not denied that all of them were ordered by the military authorities, and carried out under their direction and command and ended under their direction and command.

The disciplining of prisoners of war in a foreign country within zone territory at a time when the government is an integrated power and acting within treaty obligations, certainly carries no treasonable intent, even if it may be objectionable and contrary to our own standards of punishment.

An examination of each of the acts will show that there was no treasonable intent in any of them.

The Government Itself Did Not Contend, During the Trial, That the Acts Here Charged Showed Treasonable Intent, but They Relied on Independent and Different Evidence to Show Treason.

The policy of that evidence, in the setting of this case, and the type that was furnished, was that there was no proximate cause between the alleged intent and the overt act charged in the indictment. The disassociated evidence of alleged intent was likewise trivial and commonplace in its character.

Cramer v. United States, 325 U. S. 1.

We have set out the *intent evidence* in the appendix because of its length. None was proof of specific intent to betray the United States by means of any of the overt acts. To borrow an expression from the law of negligence there was no proximate causal relation between the two.

The words might lawfully have been uttered by a citizen of the United States.

Hartzell v. United States, 322 U. S. 680, 689.

To permit an intent to betray to be inferred from speech regarding a war and to convict for some later trivial act disconnected with the speech is to enlarge the crime of treason far beyond historical conceptions, and to make any war talk some evidence of treasonable intent is to stretch the law of treason beyond its prescribed constitutional and statutory limits.

Time after time the court admitted testimony regarding trivial matters, completely disconnected with any overt act,

under the guise of showing "intent and state of mind." None of these alleged incidents, as a matter of law, could arise to the level required to show a treasonable intent and state of mind. The only result was to inflame the minds of the jurors and prejudice them against the defendant.

Below are these incidents with references to the reporter's transcript where the offer was made for their admission on the ground referred to, the proper objection made, the court's ruling and the evidence received. A careful reading of these references will disclose that in most instances other Japanese were present and when taken into consideration along with the circumstances in this case the proper inference should be that the defendant was interpreting orders given by his superiors and not going to show his own intent or personal state of mind.

Testimony was received that the defendant thought it was dirty of General MacArthur to leave the men in the Philippines and that he was no good. [See Rep. Tr. p. 365, lines 6-25.] Also that "It looks like MacArthur took a run-out powder on you boys." [See Rep. Tr. p. 648, lines 1-6.] And a statement that "Roosevelt was no good." [See Rep. Tr. p. 1981, line 3, to p. 1982, line 5.]

Similarly witnesses were permitted to testify time after time to incidents where the defendant had urged the prisoners to get out more work with many instances where the Japanese hanchos were standing right along side of the defendant so that the only fair inference is that the orders came from the other Japanese and not from the defendant. [See Rep. Tr. p. 600, lines 4-22; p. 964, lines 4-9; p. 965, lines 2-5; p. 1079, line 19, to p. 1080, line 11; p. 1158, lines 12-18; p. 1159, lines 3-10; p. 1211, lines 13-23; p. 1334, line 4, to p. 1336, line 7; p. 1402, lines 7-10; p.

1696, line 9, to p. 1699, line 4; p. 1779, line 8, to p. 1780, line 4, and p. 2432, line 1, to p. 2433, line 16.]

Evidence was also received on the same grounds that the defendant had taken away the rations of certain men because they were too ill to work [see Rep. Tr. p. 651, line 11, to p. 654, line 17, and p. 2218, lines 5-21] or because they had not done sufficient work [see Rep. Tr. p. 1707, lines 5-12] and that the defendant had made a prisoner work even though the Japanese hanchō had permitted the man to rest because of illness. [Rep. Tr. p. 1893, line 10, to p. 1894, line 6.]

Prejudicial evidence was received regarding alleged statements of the defendant as to his opinion of which race was superior. For example: "The Japanese were a little superior to your American Soldiers" [see Rep. Tr. p. 648, lines 1-6]; and "* * * the Japanese were far superior to the American people and if the American army had Japanese officers, why, they could whip the world." [See Rep. Tr. p. 1509, line 13, to p. 1510, line 17.]

When one considers that the defendant was at the camp in the capacity of an interpreter the normal construction to put on his statements is that he was interpreting the orders of his superiors. However, the court admitted prejudicial testimony tending to show that the defendant was giving orders on his own initiative. In some instances the witness used the word "order" and considerable time was consumed getting the witness to whip his testimony into shape to get around an objection that it was his conclusion. [For examples see Rep. Tr. p. 724, line 17, to p. 725, line 6; p. 726, line 21, to p. 727, line 4; p. 1280, line 8, to p. 1281, line 5; p. 1281, line 17, to p. 1282, line

9; p. 1502, line 9, to p. 1503, line 13; p. 1700, line 25, to p. 1701, line 5; p. 1703, line 13, to p. 1704, line 14; p. 2043, line 7, to p. 2045, line 23, and p. 2436, line 8, to p. 2437, line 8.]

And alleged statements of the defendant as to how long the war would last and who would win were permitted in evidence as going to show intent and state of mind. [See Rep. Tr. p. 791, lines 6-17; p. 881, line 19, to p. 882, line 1, and p. 962, line 13, to p. 963, line 3.] The same is true of statements that the defendant intended to return to the United States with several witnesses testifying that the defendant said he would be a "big shot" because he knew both languages. [See Rep. Tr. p. 882, line 16, to p. 883, line 6; p. 1166, lines 14-22; p. 1705, line 23, to p. 1706, line 16; p. 1776, line 15, to p. 1777, line 17; p. 2046, line 16, to p. 2047, line 5, and p. 2159, line 19, to p. 2160, line 7.]

Some of the evidence received to show intent and state of mind of the defendant to support a charge of treason, if it were not for the many instances of inflaming the minds of the jurors against the defendant, should be construed to show a disposition of the defendant to prevent the prisoners from receiving more severe punishment. For example a statement of the defendant that "I guess you fellows understand the circumstances. If you don't work, why, you will suffer." [See Rep. Tr. p. 1277, line 4, to p. 1278, line 11.] The same is true of such statements as "Don't you know you are not allowed to have this kindling," "Don't you know it is against the camp rules

and regulations?" [See Rep. Tr. p. 1160, lines 7-24.] Also when the defendant was accused of taking some roasted nuts from the witness Bruce [Rep. Tr. p. 2758, line 23, to p. 2761, line 5] or a cigarette [Rep. Tr. p. 2764, line 24, to p. 2767, line 5] when they were supposed to be working.

Many of the alleged statements of the defendant could only have been offered to arouse the jurors' passion and prejudice against the defendant for there is no possible connection between any of the overt acts or even the general subject of treason. For instance calling Red Cross furnished corned beef "American garbage" [Rep. Tr. p. 1332, line 22, to p. 1333, line 11]; or that the Japanese "couldn't waste any good medical aid on a bunch of lazy Americans" [Rep. Tr. p. 1336, lines 19-25]; or that the United States Government "never gave me a damn thing" [Rep. Tr. p. 1374, line 12, to p. 1375, line 23]; or the statement allegedly made on the day hostilities ceased that "you will be getting fat from now on." [Rep. Tr. p. 2221, lines 4-15.] The same is true of alleged statements that the defendant wished the Americans were all dead. [Rep. Tr. p. 1641, line 21, to p. 1642, line 8; p. 1860, lines 3-17.]

Probably the prize alleged situation offered by the government and admitted into evidence to show intent and state of mind was the testimony of the witness Carter that the defendant had made two of the boys thumb their nose at the United States. The witness testified to repeated

trips by the defendant into the jimusho, or Japanese office, while this incident was going on as well as to the presence of other Japanese. Yet the prosecution offered and the court admitted this evidence as tending to show the personal intent and state of mind of the defendant. [See Rep. Tr. p. 1856, line 16, to p. 1859, line 1.]

Taking into consideration all of the circumstances in this case, the defendant contends that, as a matter of law, the above-mentioned evidence could not possibly go to show a treasonable intent and state of mind and was of such a prejudicial and passion arousing nature that the conviction must be set aside.

To Save Repetition Under the Heading of Errors of the Trial Court in the Admission of Evidence We Also Urge That the Admission of All of This Evidence to Show "Intent" Was Prejudicially Erroneous.

It must be clear that dual citizens of the United States residing in an enemy state are not guilty of treason by reason of some acts of trafficking with the enemy which, in the case of other citizens, might warrant a conviction.

"(b) Treason is not committed by the expression of ideas and opinions.

'Mere words that are expressions of opinion, printed or written, will not constitute acts of treason' or 'intent' to betray."

Frohwerk v. United States, 249 U. S. 204, 208;

United States v. Werner, 247 Fed. 708, 710;

Wimmer v. United States, 264 Fed. 11;

Equi v. United States, 261 Fed. 53;

United States v. Herberger, 272 Fed. 278;

Chafee: *Free Speech in the United States*, pp. 259-260;

Hurst: *Treason in the United States*, 58 Harvard Law Review 430. (This is a complete historical summary of the law of treason.)

Defendant's State of Mind.

The evidence regarding Kawakita's state of mind at that time did not meet the burden of proof required of the Government to show that Kawakita did *not in fact believe* that he was 100% Japanese during the times mentioned in the indictment or to show that he had any intent to betray the United States.

The proof was all to the contrary.

The defendant, at all times, believed that he was a citizen of Japan owing his entire allegiance to Japan. The very evidence cited above to show "intent" if it proves anything, it proves that the defendant regarded himself as totally Japanese. Therefore, even though it might be argued that he was a dual citizen and therefore also a citizen of the United States under the Fourteenth Amendment, the entire evidence in this case is uncontradicted that he was a citizen of Japan owing allegiance to Japan, and that he therefore had at no time any intent to betray the United States.

III.

(A) The Trial Judge Erred in Holding That Venue Existed at Los Angeles, California and That the Trial Court in California Had Jurisdiction and That He Was Not Denied a Speedy Trial in Japan.

After the surrender of Japan, Camp Oeyama was taken over by the United States officers. Its consular officers were re-established, and they again became invested with the power to try all cases. (Title 22, U. S. C. 141-145.) They necessarily were still governed by the provisions of the Treaty of 1858 (*Ross v. McIntyre*, 140 U. S. 453, 35 L. Ed. 581; *Clark v. Allen*, 331 U. S. 508.) Major Martin was placed in charge. It became a Military occupation, or district. Military Commissions were also organized and ready to try any offender.

United States v. Rice, 4 Wheat. 246;

Croft v. Harrison, 16 Hiel 164;

Leitensdorf v. Webb, 20 Hiel 176;

The Grapes Hot, 9 Wall. 129;

New Orleans v. Steamship Co., 20 Wall. 387;

Dooley v. United States, 182 U. S. 222;

MacLeod v. United States, 229 U. S. 416;

Ex parte Quirin, 317 U. S. 1, 87 L. Ed. 3;

In re Yamashita, 327 U. S. 1.

Under the Sixth Amendment to the Constitution of the United States, the defendant was entitled to a speedy trial and in Japan, since it was by occupation a part of United States territory. He could have been tried by court martial if there was the slightest basis of the charges (Article 33, 81 and 82, Articles of War.) or by the American Consul or by a Military Commission.

Under Title 18, Section 3 (1946 Edition), any person who failed to report treason immediately was guilty of mis-prision of treason.

Not only did Congress provide court martial punishment for prisoners under the circumstances, but by the laws of war Military Commissions were authorized; but under the circumstances Kawakita became technically a prisoner of war himself, upon the Americans taking over the camp, and he could be prosecuted and punished in accordance with the Laws of Wars, or the Laws of Nations, or both, and in accordance with our own court martial procedure.

Title 22, Sections 141 and 142, U. S. C. A. give jurisdiction to the American consul-general to try criminal cases in Japan. The Treaty of the United States with Japan of June 17, 1857 and the Treaty of July 29, 1858 provide that Americans committing offenses in Japan should be tried by the American consul-general.

Title 22, U. S. C. A., page 72, Sections 140, 141, and see *Ross v. McIntyre*, 140 U. S. 453, 35 L. Ed. 581, affirming *In re Ross*, 44 Fed. 185.

The law provides that the trial of all offenses committed on the high seas shall be in the district where the offender is found, or into which he is first brought, includes the jurisdiction of the consul-general to try offenses.

Under Title 22, Section 145, jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States.

The Americans took over the camp on August 15, 1945. [R. 350.] Sgt. Montgomery was an investigator for the United States Army. The Americans began taking excursions around Miyazeu Bay at that time with Japanese.

[R. 357.] Kawakita was in and around the vicinity of the camp [R. 355] from August 15 to September 10th or 11th, when the men left the camp. [R. 356.] American officers maintained military regulations. [R. 358.] They took over the Japanese headquarters. [R. 358.] Fifteen men took off from the camp and were not seen again. [R. 359.] But Kawakita was not only around there, he went to the American Consulate repeatedly and to the 8th Army of Occupation. If he had committed treason he would have been arrested and prosecuted then, and there would not have been a delay of two years and a treason case which took seven months to manufacture after Kawakita was seen in the United States.

If Kawakita was guilty of treason, every one of the prisoners of war and witnesses for the government who testified against him were guilty of misprision of treason in not reporting it promptly. We assume, rather, that they did not commit misprision of treason and by the same token that Kawakita was not guilty of treason.

We turn now to the treaties between Japan and the United States.

The treaty of June 17, 1857, executed by the consul-general of the United States and the governors of Simoda, is the one which first conceded to the American consul in Japan authority to try Americans committing offenses in that country. Article IV of that Treaty is as follows:

“Art. IV. Americans committing offenses in Japan shall be tried by the American consul-general or consul, and shall be punished according to American laws. Japanese committing offenses against Americans shall be tried by the Japanese authorities, and punished according to Japanese laws.” (11 Stat. 723.)

The Treaty with Japan of July 29, 1858, in some particulars changes the phraseology of the concession of judicial authority to the American consul in Japan, but, as we shall see subsequently, without revocation of the concession itself. Its sixth article is as follows:

“Art. VI. Americans committing offenses against Japanese shall be tried in American consular courts, and when guilty shall be punished according to American law. Japanese committing offenses against Americans shall be tried by the Japanese authorities and punished according to Japanese law. The consular courts shall be open to Japanese creditors, to enable them to recover their just claims against American citizens, and the Japanese courts shall in like manner be open to American citizens for the recovery of their just claims against Japanese.” (12 Stat. 1056.)

As will be seen, the language of the fourth article of the Treaty of 1857 is that “Americans committing offenses in Japan shall be tried,” etc.; while the language of the sixth article of the Treaty of 1858 is that “Americans committing offenses against Japanese shall be tried,” etc. Offenses committed in Japan and offenses committed against Japanese are not necessarily identical in meaning. The latter standing by itself would require a more restricted construction. But the twelfth article of that Treaty obviates that. It is as follows:

“Art. XII. Such of the provisions of the Treaty made by Commodore Perry, and signed at Kanagawa on the 1st of March, 1854, as conflict with the provisions of this Treaty are hereby revoked; and as all the provisions of a Convention executed by the consul-general of the United States and the governors

of Simoda, on the 17th day of June, 1857, are incorporated in this Treaty, that Convention is also revoked."

It will thus be perceived that the revocation of the Treaty of 1857 was made upon the assumption and declaration that all its provisions were incorporated into the Treaty of 1858.

The war between the United States and Japan did not abrogate the treaty of extradition between those two countries.

Clark, Attorney General v. Allen, 331 U. S. 503;
Society for the Propagation of the Gospel v. New Haven, 8 Wheat. 464, 494.

The fact that Japan was under a military government from August 15, 1945, would not have precluded it from performing its obligations under a previous treaty.

Clark, Attorney General v. Allen, 331 U. S. 503;
Neely v. Henkel, 180 U. S. 109, 120.

It is clear that treaties may "confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limitations of the other" which will be enforced by the courts.

Edye v. Robertson, 112 U. S. 580;
United States v. Rauscher, 119 U. S. 407;
Johnson v. Browne, 205 U. S. 309;
Cook v. United States, 288 U. S. 102, 121;
Ford v. United States, 273 U. S. 593;
United States v. Schonweiler, 19 F. 2d 387;
United States v. Ferris, 19 F. 2d 925.

By January 1, 1946, the Military Commissions in charge of the Supreme Commander, General Douglas MacArthur, had been formed in Japan. Other Japanese were tried and punished by the Commission. At no time was Kawakita molested, or tried, or punished. Whatever information this case was based upon was then in the possession of the American forces. Sergeant Montgomery was in fact a counter intelligence agent or American spy, an investigator for the army. [R. 350.] He had full knowledge of everything that went on in the camp. Major Martin had taken over the camp; Lt. Bleich, the doctor in charge, had kept a diary for a long time. Kawakita's name nowhere appears in the diary. And Kawakita had many witnesses and records immediately available to defend.

Major Martin had used Kawakita as his chief aide in interpreting between natives and the American in arranging for telephone service for the camp, on taking Americans on excursion trips, arranging a prophylactic station at the police station for the American soldiers (after their visits to Japanese girls) and he and he alone of all of the three interpreters was used to arrange a banquet for American officers, and be present. He also arranged for their departure. He arranged for their trains, was at the depot at the time and assisted in getting all of the baggage aboard when the men left, and had in every way assisted the Americans in the camp. He was the last man they saw when they departed. Afterwards, he reported to the American Consul, who has the power of arrest, in making his application for passport, and went to the American

Consulate on several occasions. He also reported to the Eighth Army in seeking transportation back to the United States, and went there many times. At no time was it suggested that he be arrested or charged with any offense.

The case here, then, developed only after a former American prisoner of war, William Bruce, had bumped into the defendant in Sears Roebuck & Co. store in Los Angeles, who had prevented him, when he was a prisoner of war at Camp Oeyama, according to his testimony, from eating a nut. It was here that "treason" was born. It took seven months thereafter to create and manufacture a case which might appeal to former prisoners of war and bring about a prosecution in the United States where the defendant had no witnesses able to clear him.

If the defendant was guilty of treason, it was known to the officers and men while they were in Japan and before they left Japan, and the defendant was entitled to a speedy trial, either by the American Consul or by court martial or in the American Military Commission.

Sixth Amendment U. S. Constitution.

In the case of *Harris v. The Municipal Court*, 209 Cal. 41, the Supreme Court of California held that the failure of the State to bring a number of defendants to trial whom it had named only as John Does, although their names were available, was a denial of speedy trial. By statute, the California Penal Code holds that a person who is not brought to trial within sixty days after indictment,

has been denied speedy trial. In the Municipal Court, within 30 days.

In the present case, the defendant was actually reporting and actually "found" in Japan in Camp Oeyama, at the time the Americans took it over. He was there at all times after they took it over. He was available to the American *Consulate*, which has court jurisdiction over Americans (Title 22, Sec. 141-5); to the Eighth Army of Occupation; to the Military Commission and to all authorities at all times. He not only did not hide, he actually went to their offices on several occasions.

It is respectfully submitted, therefore, that he was denied speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States, which provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a *speedy* and public trial."

(B) He Was Also "Found" in Japan Within the Meaning of Title 28, Section 102 (1946 Edition) and the United States District Court in Los Angeles, California, Therefore Had No Jurisdiction.

Ex parte Bollman, 4 Cranch. 75.

Having reported to the American Consulate numerous times, and to the Army of Occupation frequently, to hold he was "found" two years later under the facts of this case is to fly in the face of facts, and truth.

The Court Erred in the Instructions It Gave.

THE COURT ERRED IN GIVING THE FOLLOWING INSTRUCTION:

The court instructed the jury:

“In order then to be relieved of the *duty of allegiance* imposed by American citizenship, one must do some voluntary act of renunciation or abandonment of American nationality and allegiance. And it is the policy of our law to permit free exercise of the right of expatriation by all American citizens everywhere.” [Clk. Tr. p. 312.] (11-F.) (Emphasis ours.)

This instruction omits consideration of one relieved of the duty of allegiance by reason of presumptive expatriation, or presumptive non-citizenship. Also of rights of a dual citizen residing abroad. It is the position of the appellant that in order to be relieved of the duty of allegiance imposed by American citizenship, he may be either actively expatriated or *presumptively expatriated*. To be presumptively expatriated, one does not have to do some voluntary act of renunciation or abandonment of American nationality and allegiance. He is also relieved if he is a dual citizen residing in the country of his other citizenship.

The Court Gave No Instructions on Presumption and the
Effect of Presumptive Expatriation.

THE COURT ERRED IN THE FOLLOWING INSTRUCTION:

“Prior to the effective date of the Nationality Act of 1940, our law provided that any American citizen could expatriate himself by doing any voluntary act which evidenced an intent to renounce or abandon American nationality and allegiance; but our law further provided: ‘That no American citizen shall be allowed to expatriate himself when this country is at war’ (34 Stat. 1228).

When the Nationality Act of 1940 became effective, those provisions of our law were repealed; and at all times since January 13, 1941, American citizens have been permitted to expatriate themselves during war-time, *but only in the manner provided by treaty or by the provisions of the Nationality Act of 1940.*” [Clk. Tr. p. 314 (11-F(2).]

That portion of the instruction that provides that one may expatriate ones self *only* by treaty or in the manner set out in the Nationality Act of 1940 will limit expatriation to the ways specified by our laws and does not take into consideration all the means of expatriation provided by foreign laws.

It is our position that *any voluntary act expressing an intention* to abandon citizenship is sufficient to expatriate. This is the holding of Judge Fee in *United States v. Yasui*, 48 Fed. Supp. 40. We think, therefore, that the limitation which the court places on the means of expatriation was an incorrect statement of the law.

We filed a written motion (motion of opposition to statute) as construed and applied. [Clk. Tr. p. 106.]

In the legislative history of the Nationality Act of 1940 it is stated:

“Sec. 406. The loss of nationality under this chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter.

The object of this section is to make it clear beyond question that loss of nationality under a provision of chapter IV in no way depends upon a ruling of any officer of the United States, whether in the Foreign Service or in the service of one of the branches of the Government in the United States. The finding of such an officer in any case that a person has lost his American nationality because of an action by such person, including the establishment by a naturalized citizen of a permanent residence abroad or the maintenance by such a person of a continuous residence in a foreign state, as specified in section 402 of the code, would relate solely to the determination of the question presented to such officer for decision.

It may be added that a person who shall have been denied recognition abroad as an American national by a diplomatic or consular officer of the United States, upon the ground that such person had expatriated himself by the performance of one of the acts specified in this chapter would not be without a legal remedy in case he should deem the ruling in his case unjustified and such ruling should be upheld by the Department of State. If such a person should be unable to take advantage of the provision of section 274 D of the Judicial Code, as amended by the act of Congress of June 14, 1934 (48 Stat. pt. 1,

955), concerning declaratory judgments,² he might, upon arrival at a port of entry into the United States, and denial of entry as a national, resort to *habeas corpus* proceedings upon the ground that he is entitled to enter the United States as a national thereof. There seems to be no doubt as to the possibility of having a judicial decision in cases of this kind, if a person applying for admission to the United States as a national thereof submits substantial evidence of facts upon which his claim to American nationality may be based but is denied a fair hearing upon the facts, *Chin Yow v. United States* (1907), 208 U. S. 8, or the facts being admitted, he is denied admission upon the ground that under the law he has not American nationality, *Weedin v. Chin Bow* (1927), 274 U. S. 657.

The question of nationality may also be presented to a court for determination through *habeas corpus* proceedings in the case of a person who has previously entered the United States and is held for deportation from the United States as an alien but who claims the right to remain in the United States upon the ground that he is a national thereof (*Ng Fung Ho* (1921), 259 U. S. 276; *United States ex rel. Bilokumsky v. Tod* (1923), 263 U. S. 149. With reference to this subject see also Bouvé, C. L., *The Exclusion and Expulsion of Aliens in the United States*, Ch. IV, *Judicial Review of Administrative Decisions*; Clark, J. P., *Deportation of Aliens from the United States to Europe*, Ch. VIII, *Administrative Standards and Methods*, *Judicial Review*, pp. 312-322; Cook and Hagerty, *Immigration Laws of the United States*, sec. 228, *The Writ of Habeas Corpus*; Willoughby on the Constitution (2d), vol. 1, p. 325, vol. 3, p. 1668;

²Borchard, E., *Declaratory Judgments*.

Freund, E., Administrative Powers over Person and Property, Ch. XIII; Dickinson, J., Administrative Justice and the Supremacy of Law, Ch. III).

Some of the most important decisions of the courts in this country concerning nationality have been obtained through *habeas corpus* proceedings. (See for example, *United States v. Wong Kim Ark* (1898), 169 U. S. 649; *Weedin v. Chin Bow* (1927), 274 U. S. 657; *Camardo v. Tillinghast*, 29 F. (2d) 527.) In cases brought before the courts on petition for *habeas corpus* the burden is ordinarily upon the Government to prove alienage (*Bilokumsky v. Tod*, *supra*)."

What we have said with reference to the legislative history of Section 808 of the Nationality Act would seem to dispose of the court's error.

THE COURT ERRED IN CONSTRUING THE NATIONALITY ACT OF 1940 AS THE EXCLUSIVE WAYS OF LOSING ONE'S NATIONALITY. THE ACT SO CONSTRUED AND APPLIED IS UNCONSTITUTIONAL.

- (a) *The Court Erred in Holding That the Nationality Act of 1940 Was the Exclusive Way in Which One Might Expatriate One's Self, or That Congress Had the Power to Limit the Natural Right of Expatriation.*

Congress by an Act adopted July 27, 1868, declared that:

"The right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;"

and prescribed that:

"any declaration, instruction, opinion, order, or decision of any officer of the United States which de-

nies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this Government.”

Rev. Stat. Sec. 1999, 15 Stat. L. 223, 224, Title 8, Sec. 800;

This section has never been repealed or modified. It must be presumed that the Congress, in passing the Nationality Act of 1940, did not by its provisions intend to repeal or modify Section 800, or 15 Statutes at Large 223, 224, which is an expression of an existing policy inherent in our people, and was expressed July 27, 1868 and continued in all our national and international relationships since that date.

Any attempt to limit this policy, even by the Congress, is an impairment of a natural and inherent right of all people to the enjoyment of life, liberty, and the pursuit of happiness.

Any other policy is the policy of totalitarian government. It is the policy which Germany, Japan and Russia sought to impose upon their citizens who came to the United States.

The rulings of the trial court throughout this case, in holding that Kawakita necessarily was a citizen of the United States at all times in spite of his having registered his name in the Family Koseki, despite the fact that Japan recognized him as no longer an alien but one of its own subjects, and despite his having been employed in a position where only Japanese Nationals would be employed—is the ruling of the totalitarian governments, which we renounced in 1868, and by treaty with various countries, and by expressions which our State Department policies have constantly reiterated. (See Lawrence

Wheaton, 925; Warton's Conflict of Laws, Sec. 5; Senate Ex. Doc. C. 38, 36 Congress, First Session, page 153; Ex. Doc. 91, 33 Congress, First Session; Mr. Jefferson to Mr. Manard, June 12, 1817; 7 Jeff Works 73; 2 John Adams Works 370; 7 John Adams Works 174; 9 John Adams Works 313, 314, 321; 10 John Adams Works 282.)

Mr. Fish, Secretary of State, wrote a letter to Mr. Washburne, June 28, 1873, in which he said:

“It seems to this Department that the individual right of expatriation, which was thus referred to by Chief-Justice Marshall, is recognized by that clause of the fourteenth amendment to the Constitution which makes *subjection to the jurisdiction* of the United States an element of citizenship. This conclusion is strengthened by the simultaneous action of Congress.”

President Grant, in his Fifth Annual Message to Congress, 1873, said:

“The United States, who led the way in the overthrow of the feudal doctrine of perpetual allegiance, are among the last to indicate how their own citizens may elect another nationality. The papers submitted herewith indicate what is necessary to place us on a par with other leading nations in liberality of legislation on this international question. We have already in our treaties assented to the principles which would need to be embodied in laws intended to accomplish such results. We have agreed that citizens of the United States may cease to be citizens; and may

voluntarily render allegiance to other powers. We have agreed that residence in a foreign land, without intent to return, shall of itself work expatriation. We have agreed in some instances upon the length of time necessary for such continued residence to work a presumption of such intent."

And, so while the Nationality Act of 1940 determines what acts are to be taken as evidence of such expatriation, it cannot exclude any other method by which one expresses an intent to reside in a foreign land without intent to return and to be a citizen of that country, and to express it in the way that country provides. This principle is established in International Law (*Santissima Trinidad*, 7 Wheat. 283; *Portier v. LeRoy*, 1 Yeates (Penn.) 371; *Jansen v. Vrow Christina Magdalena*, Bee. Adm. 11, 23; *sub nom. Talbot v. Jansen*, 3 Dall. 383; and see *United States v. Yasui*, 48 Fed. 40).

"There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

"For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words

‘subject,’ ‘inhabitant,’ and ‘citizen’ have been used, and the choice between them is sometimes made to depend upon the form of Government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a Republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.”

Wait, C. J. *Minor v. Happersett*, 21 Wall. 165, 166.

“The United States may, by laws, fix or declare the conditions of citizenship within their territorial jurisdiction, and may confer the rights of citizenship everywhere upon persons who are not rightfully subject to the authority of any foreign Government; but they cannot, by undertaking to confer the rights of citizenship upon the subjects of a foreign nation, who have not come within their territory, interfere with the just rights of such nation to the government and control of its own subjects.”

13 Op., 89, Hoar, 1869.

It follows as a necessary corollary that any voluntary act of an American expressing an election to be accepted by another country as one of its citizens under its laws expatriates that person, under our settled doctrines and it is the foreign country which governs that election.

Perkins v. Elg, 307 U. S. 325;

Savorgnan v. United States, 94 L. Ed. (Adv) 203;

Atty. Gen. v. Ricketts, 165 F. 2d 193.

The Court Erred in the Exclusion of Evidence of the Mayor
of Suzuka City.

The trial court erred in failing to admit Exhibit CO for identification in evidence. This was the deposition of Ryuzo Sugimoto taken on the 27th day of April, 1948, pursuant to stipulation, and Mr. Sugimoto was the Mayor of Suzuka City, Miye Prefecture, Japan.

Kawakita testified as follows [p. 4384, line 15, to p. 4386, line 14]:

“Q. Mr. Kawakita, when did you decide to get your family name entered in the family register? Just what did you do? Where did you go? A. On March 8, 1943, I went with my uncle—his name is Yazaemon Kawakita, who was the head of the family koseki. I went with him to the Ishiyakushi office of Suzuka City Hall.

Q. And when you got there where did you go? A. We went to the registrar of the koseki of our family of our koseki, who took care of our koseki.

Q. What happened after you got there? A. My uncle told the registrar that this is my nephew and he desires to enter his name formally in the family koseki as a Japanese subject.

Q. What did the registrar say? A. The registrar said when I was born and I told him that I was born in September 26th, 1921.

Q. And what else was said or done at that time? A. He asked me—the registrar asked me if it was my desire to enter my name in the family koseki as a Japanese subject, and I told him yes.

Q. And then what happened? A. That was all—just a minute.

Q. Were some entries made? A. Yes. I gave them the date I was born and the place I was born

and I took the family seal and stamped it on the record.

Q. Then after that was done what happened? A. After that was done I had three copies, three or four copies of the Koseki Tohon made for me that I could register at the Tokyo police station for removal of my alien registration.

Q. And did you take a copy of them to the Tokyo police station? A. Yes, sir.

Q. And did you leave a copy there at the Tokyo police station? A. Yes, sir.

Q. After that did you also take a copy of this document to some other place, the place where you were going to work? A. Yes, sir."

Defendant's Exhibit CO was the official interpretation by the mayor of the city as to the legal effect of Kawakita's having registered his name in the Family Register. The foundation was laid as to the knowledge by the Mayor in this city of the legal effects of the entry of the name in the Family Register. The Mayor of the city is a magistrate who, as head of its city, is presumed to know the laws governing the city, and the procedure relating to an affair within the City Government. And he positively testified that he was familiar therewith.

In answer to questions propounded to him, he testified as follows [paragraph 5 to paragraph 12, incl., on page 2 of Exhibit CO]:

V.

"Q. Are you familiar with the laws relating to a Japanese head of the Family entering the names of those in his family as being Japanese nationals in the family register? A. Yes.

VI.

Q. If your answer is 'Yes,' state what those laws are. A. This law of Japan is known as Koseki-ho. This law governs the entry of the names of a family by the family head and the family register.

VII.

Q. State what the legal effect is of the head of a family entering the name of members of his family, including the nephew, in the family register. A. When the head of a family enters the name of members of his family including a nephew in the family register, this act of entry becomes a formal R. S. declaration that the member of the family so entered is a Japanese national.

VIII.

Q. Does such procedure conform to Japanese law that, when an uncle enters the name of his nephew in the family register at the request of the nephew residing in Japan, such entry constitutes a formal declaration of Japanese nationality according to Japanese law and procedure? A. Yes.

IX.

Q. Are you acquainted with the act of Yazaemon Kawakita, from the custodian of the records, wherein an entry was made by him in the official records of your Prefecture, that his nephew, Tomoya Kawakita, was born September 26, 1921, and that he wished on March 8, 1943, to declare himself to be a Japanese national, residing at 409 Uedamachi, Suzuka City, Miye Prefecture? A. Yes.

X.

Q. Did the entry of such name in your register constitute an official declaration of Japanese nation-

alty by Tomoya Kawakita according to Japanese law?

A. Yes.

XI.

Q. Did his having made this entry become an election, according to Japanese law, that he wished from that time on to be considered a Japanese national? A. Yes.

XII.

Q. Did this entry, according to Japanese law and practice, then subject him to all the rights and duties of Japanese nationality? A. Yes.”

Ryuzo Sugimoto was the Mayor of the township where Kawakita entered his name in the family Koseki. The Mayor stated he knew the laws and the procedure of his town and of his country. He is as much a qualified expert as is a lawyer. One does not have to be a member of the bar to know the laws. The President of the United States certainly knows the laws of this country and would be as much qualified to testify as would be the Attorney General as to certain laws, likewise a Mayor of a city. In New Jersey two members of the Supreme Court are laymen, not lawyers. The proper foundation for the Mayor's testimony was shown in the deposition itself. He was asked if he knew the laws and he stated that he did. There was no challenge to this statement and it must be taken as correct, therefore it was highly prejudicial for the court to exclude this document from the consideration of the jury.

The Court committed the following other errors in the admission and exclusion of evidence:

(1) *The Court Erred in the Admission of Evidence of Intent.* This constituted a wide inflammatory series of statements which we have set out in the Appendix to our brief, as page references. Each was objected to and it was stipulated that the objections might be deemed to go to all of the testimony thus referred to.

(2) *The Court erred in the admission of the Government's Exhibit 4-F, relating to the procedure and proceedings before the United States Consulate in Japan after the war ended to show that at that time the defendant overcame the presumption of expatriation.* This was entirely irrelevant to the issue of treason. It only showed that as far as that Administrative Officer is concerned that the defendant overcame a then existing presumption of expatriation. The conduct at that time was outside the sphere and scope of the indictment and could not relate back, but could only be confusing and misleading to the jury and since there was no evidence to establish the *corpus delicti*, namely, that Kawakita was an actual citizen of the United States, then owing allegiance to the United States, this testimony was irrelevant in its entirety and should not have been admitted. While we stipulated that the American Consul would testify, as set out in the documents, we did not admit that the testimony was relevant or material or competent to the trial itself.

(3) *The Court erred in permitting the prosecutor to cross-examine Kawakita based upon a statement secured from Kawakita by the F.B.I. [R. 2918-2966] but never introduced in evidence, following his unlawful arrest with-*

out a warrant. [R. 4243-4254.] The use of this statement was objected to and a cross-examination of Kawakita on the basis of his then statements were objected to as violating the defendant's constitutional rights. The objections, overruled should have been questioned.

The use of these statements for any purpose whatsoever was contrary to the decisions of the Supreme Court in the United States in *McNabb v. United States*, 318 U. S. 332; *Anderson v. United States*, 318 U. S. 350; *Silverthorne Lumber Company v. United States*, 251 U. S. 385; *Nardoni v. United States*, 308 U. S. 338; *United States v. Bayer & Radovich*, 331 U. S. 532; *United States v. Bayer*, 156 F. 2d 964; *Chambers v. Florida*, 309 U. S. 227, 84 L. Ed. 716; *Canty v. Alabama*, 309 U. S. 629, 84 L. Ed. 988; *White v. Texas*, 310 U. S. 530, 84 L. Ed. 1342; *Lomas v. Texas*, 313 U. S. 554, 85 L. Ed. 1513; *Ward v. Texas*, 316 U. S. 547, 86 L. Ed. 1663; *Ashcraft v. Tennessee*, 332 U. S. 143, 88 L. Ed. 1192; *Malinski v. New York*, 324 U. S. 401, 89 L. Ed. 1029.

The defendant would have been entitled to have the confession suppressed.

In re Fried, 161 F. 2d 453.

In *Silverthorne Lumber Company v. United States*, 351 U. S. 385, 64 L. Ed. 319 at page 321, Justice Holmes said:

“The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.”

Errors in Instructions Given.

THE COURT ERRED IN THE FOLLOWING INSTRUCTIONS
GIVEN:

The Court gave the following instructions:

“It is stipulated that the defendant’s parents were born in Japan, and by reason thereof have always been Japanese nationals or subjects owing allegiance to Japan.

According to the law of Japan, the defendant himself, by reason of his Japanese parentage, was from birth a Japanese national or subject owing allegiance to Japan.

This conflict in the laws of the two countries gives rise to what is sometimes called ‘dual’ nationality or citizenship; which means, as applied to this case, that the defendant became an American citizen upon birth, according to our law, because born in the United States; and also became a Japanese national upon birth, according to Japanese law, because of his Japanese parentage.

Under our law, any American citizen of alien parentage may, on becoming of age, renounce his American citizenship and thus become a citizen of only the country of his parents.

The question for you to determine on this phase of the case from all the evidence is whether or not at any time prior to or during the period specified in the indictment, the defendant did renounce or abandon his American citizenship. . . .

Under our law an American citizen cannot owe ‘permanent allegiance’ to more than one country at any given time. That is to say, it is legally impossible for any American citizen to *owe conflicting al-*

legiance to any other country so long as he or she remains a citizen of the United States.” [Rep. Tr. pp. 5505-5506.]

This is an incorrect statement of the law and comes under our contention made heretofore, that a dual citizen residing in the country of one of his citizenships and presumptively expatriated from the citizenship of the United States under the circumstances of this case owed 100% allegiance to Japan. This is so because all he had, as far as the United States was concerned, was a presumptively *expatriated* citizenship in the United States. He had an actual Japanese citizenship and was residing in Japan. The court's instruction that it was legally impossible for any American citizen to owe conflicting allegiance to any other country so long as he or she remains a citizen of the United States was inconsistent and misleading to the jury. He at no time defined the liability of a presumptively expatriated citizen, one of the principal issues in the case (*Screws v. United States*, 89 L. ed. 1495, 325 U. S. 91; *Corson v. United States*, 147 F. 2d 437) and erroneously defined the duty of allegiance of a dual citizen.

A presumptively expatriated citizen of the United States still remains a citizen of the United States although during that presumptive period of expatriation his allegiance to the United States is in a state of suspense. Likewise a dual citizen residing in the other country of his citizenship and receiving protection from it, owes allegiance to that country. (*Perkins v. Elg*, 307 U. S. 325; *Carlisle v. U. S.*; *Savorgnan v. U. S.*, 94 L. Ed. (Adv. 203).

2. Likewise, the court, along similar line, erred in its instruction on page 5517 of the Reporter's Transcripts, lines 9 to 14, as follows:

"As stated before, the defendant was at liberty during his stay in Japan to renounce or abandon his American citizenship and with it all duty of allegiance to the United States. But unless and until he did so, the defendant owed *allegiance* under our law to his native country, the United States."

Again we state that this was an erroneous instruction, since the defendant was a Japanese citizen owing allegiance, therefore, to Japan and was presumptively expatriated under the Statutes of the United States and did not owe allegiance under our law to his native country *the United States* during that period.

3. The Court erred in giving the following instruction:

"Section 408 of the Nationality Act of 1940 (8 U. S. C. 808) provides in substance that 'loss of nationality . . . shall result solely from the performance by a national of the acts' specified in Section 401 which I have read to you. Section 410 provides that nothing in the Nationality Act of 1940 'shall be applied in contravention of the provisions of any treaty or convention to which the United States is a party upon October 14, 1940.' There was no treaty or convention between the United States and Japan in effect October 14, 1940, which made any provision with respect to citizenship or expatriation."⁷

As applied to this case, then, Section 408 means that the acts specified from time to time in Section

⁷The trial court omitted from the instruction the words "under this Act" and the Court substituted its own words "as applied to this case."

401 are the sole and exclusive methods whereby a born American citizen can exercise the right of expatriation, and thus lose American nationality or citizenship.

At all times therefore since the effective dates of the various provisions of Section 401 of the Nationality Act of 1940—that is to say, since January 13, 1941 with respect to subsections (a) to (h) inclusive, since July 1, 1944 with respect to subsection (i), and since September 27, 1944 with respect to subsection (j)—a born American citizen desiring to lose or terminate or discontinue American nationality or citizenship was required by our law to do voluntarily—of free will—one or more of the acts specified in subsections (a) to (j) inclusive of Sec. 401, thereby evidencing an intention to renounce or abandon American nationality and with it allegiance to the United States.” [Rep. Tr. p. 5511, line 22; p. 5512, line 25.]

The Court’s ruling and change of the language of the statute was error. The Nationality Act of 1940 was not intended by any means to repeal section 800 of Title 8, U. S. Codes, which declared the policy of the United States to permit expatriation of a citizen by any means of voluntary character which showed his clear intent to become a citizen of another country, and as viewed by that country’s laws.

United States v. Yasui, 48 Fed. 40.

The Court’s construction of this section, inherently and as construed and applied in this case, denies the constitutional and natural right inherent in any citizen to change his citizenship and is contrary to the fundamental policy

of this government frequently expressed since 1868 in various opinions of the Attorney General. * *United States v. Yasui*—Opinion of Judge James Alger Fee, 48 Fed. Supp. page 40, shows that Yasui, a dual citizen, had expressed an intent to become and to elect Japanese nationality, and had therefore lost his American nationality. While the *Yasui* case went to the Supreme Court of the United States and was reversed there on other grounds, this particular question was not passed upon and therefore still remains open.

4. The court erred in the following instructions given as to the overt acts:

“While two or more witnesses must testify to the same overt act, it is not required of course that their testimony be identical. Nor is it required that each witness testify to the whole of the act, since different witnesses may testify to different parts of the act. What is required is that, in order to establish an overt act of treason, the minimum proof necessary is that direct evidence of the overt act be given through the testimony of at least two witnesses, and that the jury be convinced beyond a reasonable doubt of the truth of such testimony

Direct evidence of any overt act charged in this case would necessarily consist of the testimony of eye witnesses who saw and heard the act done—saw the movement and heard the sound, if any, comprising the act. So the constitutional requirement is met only when, after considering the testimony given by all witnesses who testified as to an alleged overt act, the jury finds that the whole of such overt act—each movement and sound, if any, comprising the alleged act—is established as charged in the indictment by the testimony of at least two witnesses.

In order to convict the defendant of the crime of treason, it is not necessary that the prosecution prove every overt act charged. But it is essential that at least one of the overt acts charged in the indictment and remaining to be submitted for your consideration be proved by the direct testimony of *at least two witnesses*, and be so proved in its entirety as alleged in the indictment.

If you find that the prosecution has failed to prove beyond a reasonable doubt the commission by the defendant of at least one of the overt acts in its entirety as charged in the indictment by 'the testimony of two witnesses to the same overt act,' you must acquit the defendant.

On the other hand, if you should find from the evidence beyond a reasonable doubt that, while owing allegiance to the United States and while adhering to the enemies of the United States, the defendant did commit one or more of the overt acts alleged, and that such act or acts have been proved in entirety as charged in the indictment, by the 'testimony of two witnesses to the same overt act,' it would be your duty then to consider the fourth essential element of the charge." [Rep. Tr. p. 5521, line 23, to p. 5524, line 9.]

It is respectfully submitted that the *two-witness rule* is not correctly given in this instruction. Two witnesses are necessary to the overt acts, but the two witnesses, if in segments, must be sufficient to establish the precise segment of the overt act. Thus, if one witness testifies to a part of an overt act and another witness testifies to another part of the same overt act, there are not two direct witnesses to the same overt act if the testimony does not

establish the whole overt act and the instruction is therefore incorrectly given.

United States v. Robinson, 259 Fed. 685, 690;

United States v. Haupt, 330 U. S. 631;

Cramer v. United States, 325 U. S. 1.

As Wigmore states in Wigmore Op. Cit., Note 71, Sec. 2036, pages 263, 264:

“The object of the rule requiring two witnesses in treason is plain enough. It is as Sir William Blackstone said to ‘secure the subject from being sacrificed to fictitious conspiracies, which have been the engine of profligate and crafty politicians in all ages.’ ”

5. The Court erred in the following instruction:

“Article III, section 2 of the Constitution of the United States provides that: ‘The Trial of all Crimes . . . shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.’ ”

Pursuant to the power thus conferred by the Constitution, the Congress in 1790 enacted in substance what is today Section 102 of Title 28 of the United States Code, which provides that: ‘The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.’ ”

It is the position of the appellant that in this offense that when Japan was conquered it became a part of the territory of the United States and was triable in Japan,

either by a court martial or by military commission (Winthrop Laws of War, Army Doc. 1001, page 778) or before the American Consulate. (Title 22, Secs. 141-5 and treaties with Japan (*supra*), and Appendix E.) That is the place where the witnesses were present and if any treason had been committed and was concealed by any of the Americans, or anyone attached to the case, it was *misprision* of treason in violation of Title 18, Section 3, U. S. Codes.

Congress did not intend these cases to be brought to some district in the United States where it was available to try the accused in a territory of the United States governed by the United States officials and subject to court martial or other procedure and proceedings. The defendant was not found in the United States but was in Japan; had reported to the military authorities, and was under the direct supervision and control of the American Army, even at the railroad station before he left. To state that he was "found in the United States" more than a year later when some former prisoner of war saw him in the United States is to belie the fact of this case and to stultify the law.

6. The Court erred in the following instruction:

"The punishment which the law provides for the offense charged in the indictment is a matter exclusively within the province of the court, and should not be considered in your deliberations in any way."
[Rep. Tr. p. 5545, lines 10-13.]

It is our contention that the court includes the jury and where the death penalty is involved the function of determining the penalty was for the jury and not the judge.

The Court Erred in Refusing the Following Proposed Defendant's Instructions.

"Defendant's Instruction No. 45:

You are instructed that the law recognizes dual-citizenship; that is to say that when a person born in the United States of Japanese parents, who cannot themselves become citizens of the United States and remain Japanese citizens, that the children are dual-citizens." [Clk. Tr. p. 153.]

"Defendant's Instruction No. 46:

You are instructed that where a person is a citizen of two countries he owes paramount allegiance to the country of his residence and would even be guilty of the crime of treason if he was disloyal to that country. Therefore, you must find from the evidence in this case to which country Tomoya Kawakita owed paramount allegiance, and if you find that he owed such paramount allegiance to Japan at the time of the offenses charged in the indictment you must find accordingly, and acquit him." [Clk. Tr. p. 154.]

"Defendant's Instruction No. 49:

A person born in one country of nationals of another, who acquire the nationality of the former by reason of the place of birth and that of the latter by reason of the nationality of the parents is in possession of what in law is called dual citizenship. Dual citizenship is not a theory or doctrine but is the unavoidable result of the conflicting laws of different countries. Under the American law of nationality, which is derived from the English law, American na-

tionality is based primarily upon the fact of birth within American territory and jurisdiction, whereas under Japanese law as it applies to this defendant, he acquired Japanese nationality through the birth of his parents in Japan.

Where one possesses a dual nationality, his paramount duties and loyalty are to the nation of his residence whether permanent or temporary. He owes allegiance to that country in which he is residing and which is given the shelter and protection of its own land and its own laws. He must obey the laws, rules and regulations of that country and where he has a duty of election he must elect to show that allegiance to the country of his residence. In time of war he is deemed by the laws of war and the laws of nations, as well as by the laws of the United States, to be an enemy for all purposes while he resides in that country, and since war suspends the ability of the country with which that nation is at war to give him any of the protection of citizenship, whatever rights of citizenship he has in the country of his non-residence are during the period of such war suspended.” [Clk. Tr. p. 157.]

It was error to refuse this instruction (*Carlisle v. United States*):

“Defendant’s Instruction No. 51:

You are instructed that the term ‘Japanese subject’ means any person who owes allegiance to the Emperor of Japan or to the Japanese Government.” [Clk. Tr. p. 159.]

Our reasons are presented in the portions of the brief heretofore devoted to citizenship.

The Court Erred in Refusing the Following Numbered Instructions of the Defendant, Which We Refer to by Reference in the Clerk's Transcript:

Pages 112, 113, 114, 116, 117, 118, 119, 121, 122, 125, 126, 127, 128, 129, 130, 131, 132, 136, 137, 138, 139, 141, 145, 148, 149, 150, 153, 154, 157, 161, 168, 165, 172, 174, 175, 177, 178, 180, 181, 182, 183, 184, 185, 187, 188, 196, 197, 200, 201, 203, 205-a, 209, 210, 212, 214, 215, 217, 219, 221, 222, 224, 225, 226, 227, 228, 229, 230, 232, 233, 236, 238, 243, 245, 247, 250, 253, 255, 256, 257, 258, 259, 260, 261, 282, 277, 281, 267, 270, 272, 273, 275, 276.

All of these instructions bore on the various theories of the defendant in the case, and had been argued under the points already presented on the questions of dual citizenship; the questions of presumption of expatriation and other questions relating to the allegations of citizenship and treason.

We call the court's attention more specifically to three instructions, however. One of these was Proposed Defendant's Instruction No. 41 at page 149 and Proposed Defendant's Instruction No. 42 at page 150.

Particularly these relate to the burden of proof upon the Government to prove Kawakita's actual citizenship at the very time named in the indictment, to-wit, between August 8, 1944 and August 24, 1945, that Kawakita was actually a citizen of the United States and not a presumptively expatriated citizen.

Two other instructions which we offered, and which the court declined to give, we deem prejudicially erroneous.

We offered instruction No. 61, Clerk's Transcript 172, as follows:

"You are instructed that where a defendant asserts that he was at another place at the time of an alleged occurrence, what is necessary is for the evidence to raise in your mind a reasonable doubt as to the occurrence in order for you to find in favor of the defendant regarding that occurrence. Therefore, if you have a reasonable doubt whether the defendant was at a given place, at a given time, you must find in his favor regarding that occurrence."

This was, in effect, an alibi instruction and the manner and measure of a jury to weigh an alibi of the defendant. All that the testimony needs to do is to raise a reasonable doubt.

29 A. L. R. 1127-1128;

Glover v. United States (8th Circ. 147 Fed. 426);

McCook v. United States, 263 Fed. 55;

People v. Vasquez, 93 Cal. App. 448;

People v. Fong Ah Sing, 74 Cal. 253;

Falgout v. U. S. A., 279 Fed. 513.

In this case, as to the overt acts of punishment, which allegedly occurred after March 1, 1945, the testimony of the defendant was that he was working in the warehouse as a clerk, handling electrical supplies; that he did not finish his work until five o'clock in the afternoon, and did not leave the plant until after that time, and at no time was he at the camp itself except a few occasions when he helped Fujisawa interpret some letters and correspondence. This testimony is corroborated by document and by the records introduced by the Government itself as to the nature of

Kawakita's employment. This evidence was, therefore, in the nature of an alibi and the jury had to consider it under an appropriate alibi and the quantum of evidence which should have been considered. The court, nevertheless, declined to give this highly important instruction.

As to the other occurrences, Kawakita also denied his presence at any of the places mentioned. As to the Toland incident, the testimony of Dr. Bleich shows that Toland was not working on any ore rock but was on a garden detail from April 21, 1945, on to the close of the war, and therefore Kawakita could not be at that place.

It was the defendant's right to have this instruction given by the defendant as follows, being Defendant's Instruction 159, on Clerk's Transcript page 277, as follows:

"Evidence that a witness has been insane affects the credibility of such witness. Such insanity is presumed to continue unless shown to have been overcome.

If you find that any witness in this case has been or was insane then you may reject the whole of the testimony of such witness on the grounds of his insanity."

Jones Commentaries on Evidence, page 4893, Sec. 2470;

Holcomb v. Holcomb, 28 Conn. 177;

State v. Kelly, 57 N. H. 549;

Worthington v. Menther, 96 Ala. 310, 17 A. L. R. 407, 7 So. 72;

1 Wharton's Evidence, Third Ed. 403;

Coleman v. Commonwealth, 25 Grath 865, 18 Am. Rep. 711.

In a letter to counsel for the appellant a captain in the American Army, assigned to duty in the war crimes trials in Japan, wrote in part as follows:

“Most prisoners of war witnesses still suffer a psychosis which causes them to indulge in a melodramatic self heroism. In my opinion it is a perversion of self pity. I feel free to venture this ‘calloused’ view since I have spent five years in the Army (2 of them overseas), and my study of POW conditions in Japan establishes that although their lot was a poor one much of the ‘horrors’ were highly exaggerated and the result of their own deportment.

“Your failure to see ‘war atrocities’ as treason is shared in by many of my associates here and we all have lived with these problems for some time. You would also be amazed to learn what attitude we have taken toward prisoner of war witnesses. In the initial stage of this war crimes program our approach to these men was indulgent. It wasn’t until we discovered that this ‘self heroism’ caused constant exaggeration tantamount to lies. With that revelation our records are replete with vigorous cross-examination of these witnesses, and in a great majority of instances brought about voluntary refutation.”

This letter expresses so admirably the situation and the jury had a right to consider the psychiatric treatment given to these prisoners of war witnesses on their return to the United States, and regarding which many of them testified.

We also wish to call to the court’s attention Defendant’s Proposed Instruction No. 84, Clerk’s Transcript page 200, in which we ask the court to instruct the jury that the means set out in Section 801 of the Nationality Act are not the exclusive methods of losing one’s nationality. That expatriation is a matter of intent on the part of the person

concerned, which intent may be shown by some express act, or some other act from which it can be gathered and that:

“Any act or declaration on the part of the defendant from which you can determine that he intended to expatriate himself is sufficient to justify a finding of expatriation, and if you so find you must acquit him.”

The court declined to give this instruction and gave one stating to the jury that the sole means of losing one's nationality were set out in Section 801 of the Nationality Act—a point we have heretofore argued at length.

We call attention of the Court, also, to our Motion, pages 106, 107, 108, of the Clerk's Transcript, challenging the constitutionality of that act as construed and applied by the court in the instant case.

We think that if the court had had before it the Legislative history and discussions regarding Section 801 of the Nationality Act, which pointed out the reason for the limitation of the act as applying solely to that section, it would not have given the instruction requested by the government and would not have declined to have given the instruction which we requested and which was refused.

The refusal of this instruction is also contrary to the case of *Perkins v. Elg*, 306 U. S. 325; *Savorgnan v. United States*, 94 L. Ed. (Adv.) 203.

The court also erred in refusing to give the jury a definition of the word “comfort” as requested by the defendant in an instruction, No. 149 at page 267 of the Clerk's Transcript. The word “comfort” connotes knowledge on the part of the enemy government that was to be comforted by the act or thing done and we think it was essential for the jury to be so informed.

One instruction was offered by the defendant, Instruction No. 157 on page 275 Clerk's Transcript, on the right of election, which the court also declined.

Several instructions were offered by the defendant regarding the term and definition of the word "allegiance" which the court declined.

While the jury was deliberating, it sent in a request for a definition of the word "betray." The defendant proffered a Webster's complete dictionary definition of the word "betray" in the light of the request of the jury. This was filed at 3:49 P. M. August 31, 1948. [Clk. Tr. 284.] The instruction was refused. It was the right of the jury to have a complete Webster's Dictionary definition of the word "betray," which apparently was bothering the jury on this date—three days before it came in. No satisfactory definition of betrayal was given to the jury, but this definition showing that treason required *betrayal or to deliver into the hands of the enemy by treachery or fraud, in violation of trust; to prove faithless or treacherous to, as to a trust or trusts; to mislead; to reveal; to disclose in violation of a confidence*, were essential definitions because Kawakita at that time did not have a trust which he could betray to the Japanese government and none of his acts constituted "betrayal" in the sense in which that word is defined.

The defendant also tendered Defendant's Instruction 62-a, page 174 of the Clerk's Transcript, regarding the method of considering overt acts—that they cannot be partly proved and partly disproved. It was a highly essential instruction to be given in the light of the variance of the different witnesses who themselves disproved parts of the overt acts in the case.

IV.

The Trial Court Erred in Denying the Defendant the Right to Inspect the Minutes of the Grand Jury and the Right to Question the Foreman of the Grand Jury Regarding the Return of the Indictment.

At the outset of the case, an effort was made to determine whether the indictment had been returned on sufficient evidence; that is to say, on the testimony of two witnesses to an overt act. [Rep. Tr. June 27, 1947, pp. 38 *et seq.*] This was partly occasioned by reason of the fact that the complaint against the petitioner before the United States Commissioner was based on an affidavit of hearsay information solely of F.B.I. Agent Sawtelle, who had never been in Japan. The trial court denied the motion to inspect the minutes of the Grand Jury, and refused to allow the foreman of the Grand Jury to be questioned.

Rule 6 of the Rules of Criminal Procedure, however, adopted by the Supreme Court of the United States, permit a jury to be questioned,

“upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.”

The Fourth Amendment to the Constitution of the United States provides as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Therefore, the accused has the right to question the legality of his arrest and whether there is any probable cause for his seizure. The constitutional requirement of *two* witnesses to an overt act in furtherance of an intent to betray is essential.

The mere statement of an F.B.I. Agent and an affidavit on information and belief would not be sufficient.

Furthermore, since a superseding indictment was brought, it was a different indictment and requires the same kind of evidence as did the former indictment. And, the indictment required at least twelve votes for all who heard all of the testimony relating to the alleged crimes. Since an indictment had been returned, there was no reason for secrecy surrounding these events and the Rules of Criminal Procedure specifically permit such an inquiry.

Kawakita had been arrested without a warrant. The only complaint filed against him was by an F.B.I. Agent. The arrest could not be justified nor could a Grand Jury indictment be justified if it was without probable cause.

United States v. Di Re, 332 U. S. 581, 92 L. Ed. 210.

Kawakita had not been told why he was arrested in accordance with the requirement of California State Law. (See Section 841, California Penal Code; *United States v. Di Re*, 332 U. S. 588; *Bad Elk v. United States*, 177 U. S. 529.)

We challenged the arrest, in the courts below, as illegal. [R. 2954.] Thereafter, Kawakita was taken to the Bureau and held for two hours before being arraigned before a Magistrate. He was thereafter questioned and made a statement to F.B.I. Agent. The statement itself was not introduced in evidence. [R. 4244-59; 4384-8.]

The Court, over objections of the defendant, permitted the Government to cross-examine the defendant from the statement thus secured, and to impeach him in the trial from the illegally gotten statement, which was done over objection and violated the defendant's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States. [R. 4242, 4254, 4263 J.] The Court overruled the objections.

V.

The Trial Court Erred in Permitting Fourteen Jurors to Sit Throughout the Trial of the Case.

The appellant, at the outset, challenged the right to have two alternate jurors set in the case. Juries in the courts of the United States are tried according to the principle of common law.

The conception of trial by jury in our Anglo American system is so that certain elements have long been regarded as of its essence.

1. The term jury denotes a body of twelve—no more and no less. Learned judges have, indeed, sometimes permitted themselves to say that Magna Carta guaranteed the right to trial by twelve jurors. (*Thompson v. Utah*, 170 U. S. 343, 349, 42 L. Ed. 1061.) At the beginning of the Thirteenth Century, twelve was indeed the usual but not the invariable number. (Thayer, Evidence, 85.)*

*The importance of the number is dwelt upon by Lord Coke, who says: "And it seemeth to me that the law in this case delighteth herself in the number of twelve. . . . The number of twelve is much respected in Holy Writ, as twelve apostles, twelve stones, twelve tribes, *et seq.*" Cole. Litt. 155 A. See also Somers, The Security of Englishmen's Lives, 94 (Harvard Law School 1126, Jefferson Works 5102).

Trial by jury is a trial by twelve men, no more, no less —not fourteen.

Capital Traction Co. v. Hof, 174 U. S. 873, 43 L. Ed. p. 881.

The selection of two alternates makes the jury fourteen and not twelve. It is idle to say that these two extra persons associating as they do with the other twelve, do not discuss evidence or other matters and do not have a weighty influence on the jury. Jurors are human and the whole issue must be left to but twelve jurors.

It was therefore error not to refuse to discharge the two alternate jurors and to maintain a jury of fourteen throughout the trial.

VI.

A. The Verdict Was Illegally Obtained Through Coercion. The Verdict and Judgment Are Therefore Null and Void, as Violative of Due Process of Law Guaranteed by the Fifth Amendment to the Constitution of the United States.

The jurors were sent out to deliberate on August 25, 1948. The weather was extremely hot. [Deft. Ex. 1 on Motion for New Trial.] The jury was confined in a small jury room without benefit of any air conditioning, fans, or other things. The janitors brought plenty of towels. The jury had been in charge of four deputy marshals from the United States Marshal's office. On the morning they were sent out to deliberate a crier from Judge Harrison's court was obtained by the trial judge to take charge of the jury. This was Mr. John Scheibe, who was formerly an officer in the United States Navy.

On August 26, 1948, Mr. Scheibe brought the court a note from the jury to refer to some testimony. One of the jurors wanted the testimony of Montgomery on the subject of Overt Act (b) as alleged. The court so stipulated that Montgomery did not testify at all as to Overt Act (b). The testimony of *Fujisawa* was read to the jury, as requested, from page 3585, line 15, page 3644, line 12.

Three days passed without any event and on August 29, 1948 at 3:20 P. M. the court informed counsel that

“The bailiff has brought me a further communication from the jury which reads as follows:

‘The jury is unable to arrive at a verdict. A majority of the jury feel there is no probability of doing so.

(Signed) Wm. W. Andrews, Foreman.’”

The court then proposed to call the jury in and give them an instruction such as was given in *Alice v. United States*, reported in *Allen v. United States*, 164 U. S. 492, at 501. Defense counsel objected to the proposed instruction, and also stated:

“I would oppose any instruction being given to the jury at this time. I think that any comment your Honor would make now would be in the nature of compulsion.”

Defendant counsel also moved to discharge the jury but in the absence of discharging the jury stated that if the court wanted to keep them for further deliberation to do so without further comment. It was agreed that the jury might be informed that the court wished them to deliberate

further without additional comment. The court at that time stated:

“Mr. Lavine’s position is, as I understand it, that there might be some coercion effected in making any additional comment to the jury at this time above merely sending them word that the court expects them to deliberate further.”

The court then sent them word to continue further deliberation.

On Monday, August 30th, the jury deliberated for a considerable period of time. Court reconvened and the following proceedings occurred:

“The Court: The bailiff has brought me a further communication from the jury which reads as follows:

‘The Foreman, personally, respectfully requests permission to approach the bench, or other similar action, for the reason of securing aid and advice of the Court, on a matter of procedure, concerning the proper deliberating of the jury. This matter is, in my belief serious and I am supported in that belief by other members of the jury. The Court’s consideration of this request will be appreciated, and of help.

(Signed) Wm. W. Andrews, Foreman.’

Have counsel any suggestions before the jury be brought?

Mr. Lavine: None, your Honor, except that I think now, since their note of last Saturday and their further deliberations this morning, any further deliberation would be in the nature of compulsion, and I therefore move that the jury be discharged. I make that motion in their absence.

The Court: The motion is denied. I understood your motion made Saturday and I understand your view. You would like to have them discharged. I appreciate that, but this has been a long case and they are asked a great many questions to answer and they have not asked to be discharged yet."

The jury was called back into court and the following proceedings took place:

"The Court: Members of the jury, I have received a further communication from the foreman which reads as follows:

'The Foreman, personally, respectfully requests permission to approach the bench, or other similar action, for the reason of securing aid and advice of the Court, on a matter of procedure, concerning the proper deliberating of this jury. This matter is, in my belief serious and I am supported in that belief by other members of the jury. The Court's consideration of this request will be appreciated, and of help.

(Signed) Wm. W. Andrews, Foreman.'

Before anything is said I want to caution you again: The court is not interested until you have reached unanimous agreement in hearing anything about how the jury stands numerically or otherwise, as I told you at the time the case was given to you. So in anything that is said, I want to caution you against any statement of any kind as to how you stand numerically or in any other manner.

What is the question as to procedure?

'The Foreman: Your Honor, it is my belief that we have a juror here who is impeding justice.

The Court: Now, I don't want to hear anything about it. That is indicating how you stand.

The Foreman: Your Honor, it is not—

The Court: It is a question of the procedure.

The Foreman: It does not indicate how we stand.

The Court: Very well. Perhaps I am too hasty.

The Foreman: There are other members. We are not 11 to 1 or anything else.

The Court: I don't want to hear anything about how you stand.

The Foreman: I understand. Excuse me, please, your Honor.

The Court: Proceed, please, Mr. Foreman.

The Foreman: I believe that this juror is impeding justice, interfering with the course of this trial, and making it so that this jury will never and can never arrive at a verdict; and that we are kept there, not only unable to proceed, but with this person who is personally objectionable to some members of the jury.

The Court: Is that the question?" "

The Court then gave them the further instruction to try to agree and suggested that they retire and deliberate further.

The foreman of the jury, Mr. Andrews, on Monday asked that the jury be polled on an opinion of this because he felt that it was utterly impossible and the feeling in the jury room was high as "there is a personal animosity there that could possibly be dangerous."

The Court said that it won't help to poll the jury. "I don't even know the question you wish to be polled upon."

"The Foreman: We wish to be excused. We feel that we cannot arrive a verdict and the jury has been polled."

Defense counsel then requested that the jury be polled on that question, which request was denied. Juror Clancy spoke. He said, "We have been locked up five nights and five days and we have not accomplished a thing and we never will. There is animosity crept in and there is everything crept in." He said, in answer to the Court's inquiry, that it was impossible for the jury to agree upon a single answer to any one of the 104 questions propounded.

Juror Sidle said he had been on many juries and that every question had been discussed. "We approached it from every angle. There isn't an angle that I can think of that could be approached that would bring about, as we feel, any positive result or agreement. We agree and not agree, and we just can't get anywhere with a situation, in the slang phrase 'hung up.' That is what we are up against." After stating that they had devoted all their energies and studied it from every angle, he continued: "It has gotten to the point where, personally, I feel that there is absolutely nothing can be done. Of course, if the Court has anything or could do anything to help—but I understand. I am willing to go ahead as long as my energies will hold up."

The Court discussed the subject further with the jury, making, among other remarks:

“You are the sole judges of how you shall deliberate, and while the court may keep you deliberating, the court can’t make you deliberate. It is the old story: You can ride a horse to the water, but you can’t make him drink.

When a situation like this is reached, the court tries to be of assistance to the jury. Frequently the position is made—and in many instances, perhaps, properly so—that the court is attempting to coerce the jury or to force the jury to arrive at a verdict.”

The Court then gave jury a further instruction that it was their duty to agree, unless it would do violence to their individual judgments, and by the minority to have a disposition to be convinced by the majority. We will discuss this more fully.

After further discussion, the Court asked if the jury wished any further suggestions, whereupon the *foreman* said:

“I still insist, Your Honor, that it is utterly impossible. Persons of ordinary and reasonable intelligence could discuss things and arrive at any point—

The Court: That was not my question. My question was: Do you want any further suggestions from the court?

The Foreman: I renew my request that the jury be dismissed, Your Honor.”

Whereupon, Mrs. Ziegler, a woman juror, raised her hand and the Court said:

"The Court: Who was it had up their hand? Mrs. Ziegler, do you have something?

Juror Ziegler: Perhaps not. May I, Your Honor?

The Court: Yes; you may.

Juror Ziegler: Would it be out of form to have a new foreman? Mr. Andrews has not been well over the week end and somebody else has not.

The Court: You are entitled to elect your own foreman at any time.

Juror Ziegler: That would not help any.

The Foreman: I might say that the lady nominated me for foreman, Your Honor.

Juror Ziegler: Yes; I did."

The Court then gave an instruction to the jurors which we will hereafter quote in full and attack. Thereupon, Foreman Andrews, after the instruction to the jury, again stated to the Court:

"The Foreman: May I be heard further, Your Honor? I think the court does not understand the point that I raise. No one here objects to which way any juror voted, but the manner and statements made indicate to us this long time that it is going to be utterly impossible to complete this. It is not—no one here objects to any way or which way.

The Court: I understand that, Mr. Andrews.

The Foreman: I was not trying to state how the jury stood. But there is one question—

The Court: But sometimes, when people differ with us, that affects our opinion of them, you know.

The Foreman: I understand that, but as time goes by, it seems to me that sufficient time has gone by. That is my personal opinion and I have a great hesitancy for returning to the jury room.

The Court: Well, Mr. Andrews, you are a lawyer. Let me suggest to you that maybe you are able to arrive at your conclusion in some of these matters more rapidly by reason of your legal training. It may be necessary for some of the others to catch up with you.

The Foreman: I am not alone, sir.

The Court: Well, that may be true, too.

Mr. Lavine: I again renew my request, Your Honor, in view of that statement, to discharge the jury.

The Court: Do you have something further, Mrs. Ziegler? You raised your hand.

Juror Ziegler: I don't feel like going out under the circumstances; I really don't.

The Court: It is very difficult, ladies and gentlemen of the jury, to the court to feel that you have completed your deliberations to the extent that you could under the court's instructions and not be able to arrive at a unanimous answer to one of the 104 questions presented to you. That may be the case.

It has been a long trial, as I say, and I know you are tired and you would like to be done with it. But in all the circumstances which have been mentioned here, I would ask you to deliberate further, to try further to see if you can't come to a **unanimous agreement**. If you can't answer all the questions, answer as many as you can. And, remember, again, that no juror is expected to surrender his honest convictions if, after full deliberation and attention to

the views of his or her fellow jurors, he or she remains convinced of the correctness of his or her stand on any matter involved.

You may now retire.”

Three days later the jury came in with a general verdict of guilty, and a finding against the appellant of eight of the overt acts. The jurors were thoroughly exhausted and on the verge of nervous collapse. Such a verdict is coercive.

The length of time within which the jury may be held to deliberate has been the subject of frequent discussion and coercive verdicts are in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, as denying a fair trial to the accused, since the deliberation and determination of the questions of innocence or guilt are equally due process questions.

In some states it has been held by statute that where a jury twice requests that it be discharged that it is mandatory to discharge them and a failure to do so is reversible error.

The following four states have held by statute directing deliberation of the jury, as follows:

“In *Florida, Maine, South Carolina* and *Wisconsin* there are statutes regulating the number of times a trial court may send a disagreeing jury back for further deliberation. The status in Wisconsin and South Carolina are identical, as follows: ‘When a jury after due and thorough deliberation upon any cause shall return into court without having agreed

on a verdict, the court may state anew the evidence or any part of it and may explain to them anew the law applicable to the case, and may send them out again for further deliberation; but if they shall return a second time without having agreed on a verdict, they shall not be sent out again without their own consent, unless they shall ask from the court some further explanation of the law.' (Code of Laws, S. Car. 1902, §2949; Wis. Stat. 1898, §2855.) In Florida the statute is the same, except that it omits the words 'may state anew the evidence or any part of it.' Rev. Stat. Fla. 1892, §1093. In Maine the wording is somewhat different. The statute provides as follows: 'When a jury, not having agreed, return into court stating the fact, the justice may, in his discretion, explain any questions of law, if proposed to him, or restate any particular testimony, and send them out again for further consideration; but they shall not be sent out a third time in consequence of their disagreement, unless on account of difficulties not stated when they first came into court.' Rev. Stat. Maine 1903, c. 84, §100."

"In *State v. Kelley*, 45 S. Car. 659, 24 S. E. Rep. 45, the jury had been kept together twenty-four hours, during which time they had made repeated attempts to communicate with the judge. Finally they were brought into court and told the judge that it was impossible for them to agree, whereupon he sent them back for further deliberation. One of the jurors protested against being sent back. The Supreme Court held that the statute had been violated, and granted a new trial."

American & English Annotated cases, Volume 11,
p. 1132;

State v. Place, 29 S. Dak. 489.

South Carolina:

1902: Code of Laws, 1902, sec. 2949;

1942: Latest statute regarding same subject matter is Code of Laws, sec. 642, 1942. (1932 Code, sec. 642; Civ. P. 1922, sec. 582; Civ. C. 1912, sec. 4050; Civ. C. 1902, sec. 2994; G. S. 2268; R. S. 2409; 1797(5) 358.)

State v. Stephenson, 1898, 54 S. C. 234, 32 S. E. 305, 11 L. R. A. (N. S.) 178: Juries may not be coerced in this state by confinement . . .;

Florida:

Rev. St. Fla., 1892, sec. 1093.

Statute applies to both civil and criminal cases. (*Adams v. State*, 34 Fla. 185, 15 So. 905; *Lambright v. State*, 34 Fla. 564, 16 So. 582—1894 cases.)

While sections 1093 and 2925 Rev. Stats. (secs. 4368, 8402 Comp. Gen. Laws, 1927), confer the legal right upon juries to be discharged where the circumstances therein mentioned exist, they were not designed to abridge in any way the judicial discretion vested in the judge to order such discharge whenever a proper case is presented for the exercise of such discretion, even though the circumstances warranting such discharge are not such as invest juries themselves, under the statute, with the right to demand their discharge. (Citing *Smith v. State*, 40 Fla. 203, 23 So. 854; *Tervin v. State*, 37 Fla. 396, 20 So. 551—1896 cases.)

Remark: The Florida statute is as of 1934 according to the Florida Digest; the So. Carolina statute is as of 1942.

Wisconsin:

Statutes, 1898, Sec. 2855.

Maine:

Rev. St. Maine, 1903, c. 84, sec. 100.

Such statutory mandate shows the legislative view of what constitutes coercion in obtaining the verdict of the jury.

“A verdict based upon any other method than by the exercise of the full and free judgment of the individual jurors and the weighing of the evidence is invalid. It is regarded as coercive conduct for the court to threaten to keep the jury in long continued confinement.”

People v. Sheldon, 155 N. Y. 268, 53 N. E. 841, 41 L. R. A. 644.

See:

People v. Walker, 209 P. 2d 834 at 838.

In *State v. Bybee*, 17 Kan. 462, the court said:

“ ‘A verdict is the expression of the concurrence of individual judgments, rather than the product of mixed thoughts. It is not the theory of jury trials that the individual conclusions of the jurors should be added up, the sum divided by twelve, and the quotient declared the verdict, but that from the testimony each individual juror should be led to the same conclusion; and this unanimous conclusion of twelve different minds is the certainty of fact sought in the law.’ It may be said that any act or instruction of a trial court, which tends to violate this theory of a verdict, amounts to coercion.”

In *People v. Sheldon*, 41 L. R. A. 644, the court held that:

“The old rule permitting coercion of a jury in order to secure a verdict has been swept away, and under our present method the independence of a jury is respected.”

The court, in that case, which was decided July 7, 1898, quoted from *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168, where Mr. Justice Kent, in an opinion reviewing prior cases at length paid his respect to the rule formerly existing of compelling an agreement of the jury, said:

“‘The doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict in fact be founded, not on temperate discussion and clear conviction, but on strength of body, is a monstrous doctrine, but does not . . . stand with conscience, but is altogether repugnant to a sense of humanity and justice. A verdict of acquittal or conviction, obtained under such circumstances, can never receive the sanction of public opinion. And the practice of former times of sending the jury in carts from one assize to another, is properly controlled by the improved manners and sentiments of the present day’.”

It is the duty of the court to discharge the jury if they do not agree after all of the views of the several jurors are expressed and presented in the different forms and individual opinions of the jurors are fully and conscientiously made up.

People v. Faber, 199 N. Y. 256, 92 N. E. 674.

A trial judge must not either expressly or by any act or language state anything which will carry an implication as to how long he intends to keep the jury deliberating.

Waite v. Mississippi, 124 So. 803;

Stewart v. United States, 300 Fed. 769;

Dudley v. State, 113 S. E. 24, 28 Ga. App. 711;

People v. Davidian, 20 Cal. App. 2d 720.

“Charge held to be coercive.”

People v. Demeaux, 160 N. W. 634, 194 Mich. 18;

People v. Curtis, 98 P. 2d 228;

Brasfield v. United States, 272 U. S. 448, 71 L. Ed. 345;

Jordan v. United States, 22 F. 2d 966;

23 Corpus Juris Secundum, Sec. 1043, 612 La. 98, 135 S. W. 2d 111;

People v. Bruneman, 4 Cal. App. 2d 75, 42 P. 2d 891.

In *Bollenbach v. United States*, 326 U. S. 607, 90 L. Ed. 354, the court said:

“‘The influence of the trial judge on the jury is necessarily and properly of great weight,’ *Starr v. United States*, 153 U. S. 614, 626, 38 L. Ed. 841, 845, 14 S. Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge’s last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.

“An experienced trial judge should have realized that such a long wrangle in the jury room as

occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home and escape overnight detention, particularly in view of a plain hint from the judge that a verdict ought to be forthcoming.”

To keep the jury deliberating under these circumstances in the heat and struggle that then existed was a violation of every fundamental right of the accused. It violated his right to fair trial under the Fifth Amendment to the Constitution of the United States.

B. The Court Erred in the Instructions Given While the Jury Was Deliberating.

The Court gave the following instruction to the jury on August, after agreeing with counsel on August that it should give no instructions. But, two days later, the Court gave the following instruction:

“The Court: Let us not get into that. These personalities do not have anything at all to do with the court—and these personal relationships sometimes are the things that keep us from being open-minded and arriving at a verdict.

The Court wishes to suggest a few thoughts which you may wish to consider along with your consideration of the evidence and all the instructions previously given you.

This is an important case. The trial has been long and expensive. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of sometime. There appears no reason to believe that another trial would not be equally long and expensive; nor does there appear

any reason to believe that the case can be again tried any more exhaustively than it has been on the part of either side.

Any future jury must be selected in the same manner and from the same source as you have been chosen. So there appears to be no reason to believe that the case would ever be submitted to twelve men and women more intelligent, more impartial, more competent to decide it, or that more or clearer evidence could be produced on the part of either side.

As I told you at the time I instructed you, it is rarely possible to prove or disprove, either way—it is rarely possible to prove or disprove anything to an absolute certainty.

Upon brief reflection, the matters I have mentioned suggest themselves, of course, to all of us who have sat through this trial. The only reason they are mentioned is because some of them may have escaped your attention, which must have been fully occupied in your consideration of all the evidence up to this time. These are matters which, along with other and perhaps more obvious ones, remind us of the desirability that you give the jury's *unanimous* answer to the questions asked on the 13 forms of special verdict submitted, and that you *unanimously agree* upon a general verdict of guilty or not guilty if you can do so without violence to your individual judgment and your conscience.

It is unnecessary for me to say again that the court does not wish any juror to surrender his or her conscientious convictions. As I stated at the time the case was submitted to you, do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of other jurors, or for the mere purpose of arriving at a verdict.

As I said at the time, also, it is your duty as jurors, however, to consult with one another, and to *deliberate with a view of reaching an agreement* if you can do so without violence to individual judgment.

Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence with your fellow jurors. And in the course of the deliberations you should not hesitate to change an opinion when convinced it is erroneous. And certainly a juror should never hesitate to change his opinion by reason of personalities, if they are convinced from the evidence *and from the arguments made in the jury room* that the opinion they had previously held is erroneous.

In order to bring 12 minds to *unanimous* results, you must examine the questions submitted to you with candor and frankness, and with proper regard and deference to the opinion of each other. That is to say, in conferring together you should pay due attention and respect to each others opinions and listen to each others arguments with a disposition and open-minded—*a disposition to be convinced*. If the much larger number of you are for a conviction, each dissenting juror should consider whether a *doubt in his or her own mind is a reasonable one*, since it makes no effective impression upon the minds of so many equally honest, equally intelligent fellow jurors who have heard the same evidence, with the same attention and with an equal desire to arrive at the truth and under the sanction of the same oath.

On the other hand, if a majority or any substantial number of you are for acquittal, the other jurors ought seriously to ask themselves again whether they do not have reason to doubt the correctness of a

judgment which is not concurred in by many of their fellows:

Mr. Lavine: Had your Honor concluded?

The Court: No. The court and the jury are here to come to a just and righteous result in this case. You are as anxious to reach that result, I know, as I am.

As I have stated to you before, you are not partisans. You are judges—judges of the facts and your sole purpose is to ascertain the truth as to the facts from the evidence, and in ascertaining the truth as to the facts you are the sole and exclusive judges.

You must know it by heart by now. You are the sole and exclusive judges of the credibility of the witnesses and the weight and effect of all the evidence, and in the performance of your duties you are entitled to disregard, disregard entirely all comments of the court and counsel in reaching your own judgment and in making your own findings as to the truth as to the facts.

Let me repeat again so that you will not feel that any remarks I have made are intended to put any coercion or pressure upon you: No juror is expected to yield a conscientious conviction he or she may have as to the credibility of any witness or as to the weight or effect of any evidence, *but, as I have previously said, it is your duty, members of the jury, to agree, unless after a full and impartial consideration of all the evidence with your fellow jurors, to agree would do violence to your individual judgment and conscience.*

There has been some suggestion here—there was Friday—that some of you were very tired. Perhaps I should have suggested to you at the outset that you

may be as leisurely in your deliberations as the occasion and circumstances may require. Sometimes jurors may fail to agree because they hurry too much to try to agree. Sometimes people do that.

I do not speak in any critical vein. We are dealing with an attempt to get 12 human beings to arrive at a common conclusion as to the truth.

You will remember at all times if any doubt remains in your mind, any reasonable doubt, as to the guilt, the defendant is entitled to your verdict of acquittal.

The bailiffs have been instructed to take you to your meals whenever you wish to go, to take you to your hotel whenever you wish to go. You are to take all the time you may feel necessary for your deliberations.

You may now retire and continue your deliberations as your good and conscientious judgment as reasonable men and women may determine.” (Emphasis ours.) [R. 5627-5633.]

In the setting of this case, such an instruction was positively reversible error and has been condemned in this Court in *Peterson v. United States*, 213 Fed. 920, C. C. A. 9.

For six days the jury had deliberated and had reached a conclusion as to their own individual opinion. To request the dissenting jurors at that time to consider whether a doubt in his or her mind was a reasonable one—when that juror had had a reasonable doubt for six days—was to ask the surrender of one’s individual opinions, and to use the language of the instruction

“a disposition to be convinced”

•

even against one's own conviction. Such an instruction at that time denied fair trial to the accused and is prejudicial error.

The Court, in another phase of its instruction said:

“No juror is expected to yield a conscientious conviction he or she may have as to the credibility of any witness or as to the weight or effect of any evidence, but, as I have previously said *it is your duty, members of the jury, to agree*, unless after a full and impartial consideration of all the evidence with your fellow jurors to agree would do violence to your individual judgment and conscience.”

We know of no law or rule that makes it a duty of a juror to agree upon a verdict nor to agree lest it would do violence to their individual judgment and conscience. The duty of a juror is to reach a true and correct result, whether they agree or not with the other jurors. It was a mandate to the jury of coercion; it was the language of command they had to agree, and that language was obeyed for fear of its possible consequences.

Even in the face of this language, the foreman of the jury protested.

The trial court erred in instructing the jury that it was their *duty* to agree upon a unanimous verdict if they could.

This court held such language to be error in *Peterson v. United States*, 213 Fed. 920, 924 (C. C. A. 9), wherein this court said as follows:

“Turning now to another instruction complained of. It seems that the jury first retired to consider of their verdict on Friday afternoon, and, after being out for

some time, they returned into court for further instructions, which were given. They again retired, and, after remaining out all night, came into court about 11 o'clock Saturday morning, and, through their foreman, reported that they had agreed as to the defendant Walter Peterson, but were unable to agree as to the other two. Thereupon the following statement was made to them by the court:

'The court at this time declines to receive a verdict as to one defendant. The case should be finally disposed of as to all. This is, as you know, the second trial. To try it again means to try it before a jury drawn from the same community that you have been, and with no reason to believe that they would be any more intelligent or honest than you are or any more likely to arrive at a verdict. Justice to both parties demands that the case be brought to an end. The expense of these trials is very great; possibly the expense of the parties so far incurred is from \$7,000 to \$10,000. The government has a right to a verdict without further expenditure of time and money. The defendants, if guilty, have a right to have the fact determined by a verdict before they are bankrupt in pocket, and likewise if they are innocent they have the right to be acquitted before their means are exhausted. You state, in answer to the court's question, that you stand seven to five. If seven are for an acquittal, the five should seriously inquire whether there is not a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty have found that there is; if seven are for conviction, the five should equally seriously inquire whether there is a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty find there is no doubt. After three days spent in the trial of this

case, with no reason to believe that it can be any better tried before another jury, the court is disposed to direct you to further consider the case, believing that you can honestly come to an agreement.’ ”

As said by this court in the following paragraphs:

“ . . . it is difficult to conceive what basis there was at that juncture for believing that the jury could honestly agree. . . . It was not correct to say that the government had a *right* to a *verdict* without further expenditure of time and money; *it had only a right to fair consideration of the case*. No obligation rested upon it to make any further expenditure, for, in case of a mistrial, it would have been the right, if not the duty, of the prosecuting officers to dismiss the prosecution. In any event, it was not *its* right *to demand an agreement*; nor did the defendant have such right.” (Italics ours.)

We add, neither did the court. The instruction was reversible error.

The defense counsel objected upon the retirement of the jury and repeatedly requested dismissal on the grounds of coercion. The trial judge expressed disagreement with some of the remarks that have been made by appellate court judges by coercion of juries. He expressed himself as follows to the defendant's objections to sending the jury out again. He said:

“The Court: What has happened here, I think, is a perfect answer to people who think that trial judges by asking a jury to try again to get together coerce them into finding a man guilty whom they really think is innocent. I don't think there is anything to it. I think it is an insult to the jury to suggest it. I do not believe any juror who is conscientious enough

to hold out for his views, just because the judge asks them to try again to agree, is going out and say: Well, it is all right with me. I don't think he is guilty but I will go along with you. I do not think that ever happens, **with all due respect to some of the remarks that have been made by appellate court judges on the subject.**" [Rep. Tr. p. 5637, lines 9 to 20, incl.]

Bear in mind the case was submitted to the jury on August 25, 1948. Four days later on August 29th the foreman reported to the Court that the jury was unable to agree. [Rep. Tr. p. 5597.] But the Court directed them to deliberate further. On August 30th three of the jurors indicated that no verdict could be reached. [Rep. Tr. pp. 5622-4.] And the foreman requested that the jury be discharged. [Rep. Tr. p. 5626, lines 21 and 22.] But again the Court refused to discharge the jury and proceeded to give a supplemental instruction regarding the desirability of reaching a verdict. [Rep. Tr. p. 5627 *et seq.*] This instruction was error under the circumstances and coerced the jury into reaching a verdict even though the Court attempted to caution the jurors not to surrender his conscientious convictions.

As the Court of Appeals for the Eighth Circuit said in *Edwards v. United States*, 7 F. 2d 598:

"In this case the jury, after 24 hours' deliberation upon a narrow issue, had disagreed. The foreman, when questioned expressed no hope of the probability of an agreement, and yet a speedy agreement was arrived at, acquitting the defendant on certain counts and convicting him on another, where there appeared to be little if any difference in the degree of proof adduced. We think the trial court erred in giving the supplemental instruction in the language disclosed

by the record, and that such error tended to deprive the defendant of a fair trial. The case should be and is reversed and remanded for a new trial. Reversed.”

And the said Court of Appeals in *Nick v. United States*, 122 F. 2d 660, said:

“If such statement is made in the face of an existing disagreement in the jury it is quite evident that its entire force would be felt as applying to an existing situation which had developed. *Language which might be innocent if uttered before submission of the case to the jury might be regarded as harmful if applied to a specific existing disagreement.*”

In the case at bar the supplemental instruction was given after four jurors had indicated no agreement could be reached and after the foreman had requested that the jury be discharged.

As the Supreme Court of the United States said in *Burton v. United States*, 196 U. S. 283, 25 Sup. Ct. 250, 49 L. Ed. 482, where the jury had been out but 36 hours:

“Balanced as the case was in the minds of some of the jurors, doubt existing as to the defendant’s guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. * * * A slight thing may have turned the balance against the accused under the circumstances shown by the record, * * *.”

As was said in *Stewart v. United States*, 300 Fed. 769:

“The jury in this case had deliberated many hours and had disagreed. There was at least one juror, perhaps more, that was convinced that the defendant was not guilty. The crucial questions in this case were questions of fact, that it was peculiarly the duty of the jury to consider and decide, among other things, the intention, the knowledge, the belief, the purpose, and good faith of the defendant Stewart. Much of the evidence on these questions was circumstantial; the testimony upon them was conflicting. The jury had disagreed. They received the supplemental charge from the court, retired, and in a short time returned with a verdict of guilty. As was said by the Supreme Court in Burton’s case, ‘a slight thing may have turned the balance against the accused under the circumstances shown by the record’ (196 U. S. 307, 25 Sup. Ct. 250), the supplemental charge and especially the excerpt from the opinion in Allen’s case were more than a slight thing, and our conclusions is that they bore too hard upon the convictions of the minority of the jury, and that an impartial and fair administration of justice will be served by a new trial of this case.”

In the case at bar the questions to be answered were just as crucial question of fact with circumstantial evidence and conflicting testimony. The supplemental instruction of the Court was more than a slight thing, especially the part regarding the desirability of the minority listening to the majority to consider if they were mistaken. See *Peterson v United States*, 213 Fed. 920 (C. C. A. 9).

As was said in *Bollenbach v. United States*, 326 U. S. 607:

“* * * But precisely because it was a ‘last minute instruction’ the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were ‘hopelessly deadlocked’ after they had been out seven hours. ‘In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law,’ *Quercia v. United States*, 289 U. S. 466, 469. ‘The influence of the trial judge on the jury is necessarily and properly of great weight,’ *Starr v. United States*, 153 U. S. 614, 626, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge’s last word is apt to be the decisive word. * * *”

See also:

Nigro v. United States, 4 F. 2d 781 (C. C. A. 8);
Gideon v. United States, 52 F. 2d 427, (C. C. A. 8);
United States v. Samuel Dunkel & Co., 173 F. 2d 506 (C. A. 2).

After reviewing *Allen* and other cases, says:

“Hence each charge must be examined to determine whether or not its effect is to coerce or influence unduly, and a mere formal saving clause alluding to the jury’s rights will not suffice to overcome a total effect of coercion. * * *”

C. Separation of the Jury While Deliberating.

After the case was submitted to the jury there was an unlawful separation of the jurors. After the jury was taken out to deliberate during the hot month of August, 1947, and after they had deliberated for quite a while, they were taken to the Angeles Hotel at Fourth and Spring Streets. There were three bailiffs at the hotel. [Rep. Tr. p. 5736.] The jurors occupied three floors, they visited in different rooms unattended. [Rep. Tr. pp. 5736, 5737.] The testimony of the jurors on the motion for new trial shows that there was but three bailiffs and the jurors were permitted to come and go as they pleased so that they were not at all times under the supervision of a bailiff. Juror Clancy at reporter's transcript, page 5735 *et seq.* showed that he was permitted to go to the barber shop accompanied by one of the bailiffs. Some of the jurors remained in the lobby of the hotel. Others went to their rooms. The rooms were on at least two floors, perhaps three. Hence it was a physical impossibility for the jurors to have been accompanied by a bailiff. In addition the bailiffs and doctors were permitted to talk to the jurors, without the knowledge or consent of the defendant.

As was said in *Baker v. Hudspeth*, 129 F. 2d 779 (C. C. A. 10), at page 782:

"The purpose of keeping the jury in one body during the trial of the case and not permitting them to separate except under the supervision of the bailiff or officers of the court, is to make sure that nothing they read, see, or hear shall influence them in the con-

sideration of the case committed to them. 23 C. J. S., Criminal Law, §1348, page 1010. If it is made to appear that a jury sworn to try a case is subjected or exposed to any matter or thing which might *tend* to prejudice or influence their consideration of the case, or if the behavior of any member thereof is unbecoming to a gentleman of the jury, a presumption arises against impartiality and that presumption can only be rebutted by a clear and positive showing that such matter, thing, or behavior did not influence their verdict. * * *” (Citing cases.)

In view of the testimony of Juror Clancy the Court should have permitted the defendant to fully examine all of the jurors as to their conduct during the deliberations. Not to impeach the verdict as such but to ascertain the extent of extraneous interference upon the jury's deliberations.

See:

Mattox v. United States, 146 U. S. 140;

Hyde v. United States, 225 U. S. 347;

Chambers v. United States, 237 Fed. 513;

Wheaton v. United States, 133 F. 2d 522;

United States v. Sorcey, 151 F. 2d 899.

The separation of the jury and communications with the bailiffs and others raised a presumption of partiality and prejudice to the defendant. True, it is a rebuttable presumption, but in the case at bar it was not rebutted.

VII.

During the Deliberations of the Jury Not Only Were They Permitted to Separate Without Leave of Court and Without the Knowledge of Defendant or His Defense Counsel, but Also Some of the Jurors Became Ill and a Doctor Was Called to Treat This Juror Without Any Knowledge of the Defendant or His Counsel at the Time, and Who Were Not Informed, as a Matter of Fact, Until After the Trial Had Concluded.

On Sunday, August 29, 1948, a Doctor Was Called in to Treat the Foreman of the Jury, William W. Andrews. Such Doctor Was Present With the Juror, Who Was Seriously Ill, and Medicines Were Brought to the Juror, All Without the Knowledge of Defendant or His Counsel.

The Jurors Were Kept in a Room, Ill-Ventilated and Without Air Conditioning, During the Intense Hot Weather and Were Compelled to Deliberate Until Exhausted. By Reason of the Condition of the Heat, the Jury Rooms Were Open From Time to Time.

Other Jurors Became Ill and Had to Have Medical Treatment and Care During the Deliberation All Without Knowledge of the Defendant or His Counsel.

That Such Procedure and Proceedings Denied the Defendant a Fair Trial Guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution of the United States and Was Coercive.

Furthermore, it was error for the trial court to have permitted any outsider in the jury room, or in communi-

cation in any manner, shape or form, with any juror or jurors without the complete knowledge of defendant and his counsel. Such is the oath given to the bailiffs or marshals upon their receiving the jury.

It would be an easy matter to communicate some message or messages through a doctor to a jury or jurors and such facts should have been fully and fairly disclosed to the defendant and his counsel. If there was genuine illness, then it could well have been a matter for the consideration of motions to discharge the jury because of that illness. It would certainly be coercive on the other jurors to force a jury to continue when one or more of their members was so ill he could not deliberate and it would deprive the jury of a full amount of 12 jurors.

The courts have held many times that the presence of an outsider in the jury room, or in contact with the jury, after a case has been submitted to the jury, is sufficient grounds for an order setting aside the verdict. (*People v. Bruneman*, 4 Cal. App. 2d 75-80.)

Even the judge in charge of the jury may not go to the jury room or talk to a single juror. His official place is on the bench and even as to him the law has closed the portals of the jury room and he may not enter.

Rickard v. State, 74 Ind. 275;

State v. Wroth, 15 Wash. 621 (47 Pac. 106);

Gibbons v. Van Alstyne, 56 Hun. 639 (9 N. Y. Supp. 157).

Therefore, not even a doctor should be permitted to enter, except under a situation in which both sides are informed and fully consent; and if the situation is of such emergency, at least the parties should be notified and all the

facts disclosed as soon as possible and their consent secured.

The jury had to be a full jury, composed of 12 persons, in full possession of their mental and physical capacities; otherwise it was not a jury as it exists at common law, consisting of twelve persons.

People v. Kelly, 203 Cal. 128, 133 (263 Pac. 226);

People v. Powell, 87 Cal. 348, 355 (25 Pac. 481,
11 L. R. A. 75);

Jennings v. State, 134 Wis. 307 (14 L. R. A. (N. S.) 862);

Dennis v. State, 25 L. R. A. (N. S.) 36.

In *Ray v. United States*, (8th Cir.), 114 F. 2d 508: Communications between any outsider and the jury after it has retired to deliberate should only take place after counsel for the respective parties have been informed and with the full knowledge of the defendant, if he is present. (*Fillippon v. Albion Vein Slate Company*, 250 U. S. 76, 63 L. Ed. 853; *Ah Fook Chang v. United States*, (9 Cir.), 91 F. 2d 643; *Fina v. United States* (10 Cir.), 46 F. 2d 643.) Private communications, even though harmless in themselves, may open the way to abuses and destroy confidence in legal procedure and the judiciary.

In this case, when the jury returned into the court, it was of vital importance to know the medical treatment that was afforded the jurors in view of the consequence of the proceedings.

“Courts are extremely jealous about anything occurring with the jury, which does not become of record in the court room.”

Mattox v. United States, 146 U. S. 140, 36 L. Ed. 917.

Had we known what the doctor, or doctors, had said and done prior to the jury's return into court asking for its discharge, we could have well presented an argument to the trial judge which would have required either his immediate discharge of the jury or his postponement thereof until it was determined that at least one or more of the jurors was physically able to continue. Certainly this was a right which the defendant had and was taken away from him.

During jury deliberations two or more jurors became ill. These facts were concealed from the defendant and his counsel and only after the jury was finally discharged did they learn of it.

Juror Andrews' physical condition was described by Dr. Leo Praeger, a house physician of the Angelus Hotel [R. 5707, *et seq.*]. Dr. Praeger said he was called on August 29th and he went to the room at about 10:00 or 10:30 in the morning, having been called around 9:00 o'clock. He went to Juror Andrew's room and found him extremely nervous. He made a diagnosis of nervous exhaustion [R. 5709]. The juror told him he had not been able to sleep for the last 48 hours; he had been under a nervous strain. He told the doctor and the bailiff that if he was taken out he wanted to sit in the back of the car. He did not want to sit with the other jurors [R. 5710]. He said he didn't know what might happen to him, or what he might do to somebody if he didn't sit in the back of the car [R. 5711]. He said he wanted to sit where "I won't have to fight with somebody." [R. 5711.] He examined the man's heart and blood pressure and on the basis of that diagnosed the matter as nervous exhaustion.

He left some medicine for the juror and told the bailiff to keep the man as quiet as possible, and see that he had no more excitement [R. 5713].

No information was given to counsel for the defendant or the defendant regarding the doctor's visit or attention to the juror.

In talking to Juror Clancy, Juror Andrews said "something about the talk in the jury room, the hearing room, was going round all the time and he was getting filled up on it, and could not permit it, or something like that." He was getting tired of the whole thing and it was going around in his mind all the time, and he could not sleep [R. 5728]. It was very hot in the jury room [R. 5730].

Juror Otilia Younger was examined and treated in a bus by Drs. Shaw and Sommers [R. 5718]. She was suffering from itching in the external canal and a case of sharp shooting pains in the ear proper [R. 5718]. Again the court failed to notify counsel or the defendant of the presence of outside persons in connection with the jury.

During the deliberation one of the jurors went into the ladies apartment and commenced to cry, and the other lady jurors went in and one of them gave her some smelling salts or something [R. 5739]. After the jury was discharged, Juror Nagumo had a nervous collapse.

(a) It is peculiar that the factual situation in most of the cases on this subject have been instances when the court *has* discharged the jury or a juror; nevertheless, the principles governing those cases should, logically, apply even though the factual situation is reversed—*where the court has FAILED to discharge the jury or a juror*.

It is obvious that a juror who is too sick to intelligently deliberate can, by remaining on the jury thwart the ad-

ministration of justice with as much efficacy as can the *discharge* of a juror who is well enough to intelligently deliberate. THUS THE legal QUESTION IS ALWAYS THE SAME: **Has there been an abuse of discretion** (regardless of whether the outcome of such abuse is a discharge of the juror or a failure to discharge the juror)?

In all cases in which the health of a juror comes to the attention of the court, an orthodox judicial procedure should be followed in exercising the discretion of the court. Otherwise there can be no possibility of a review in such matters.

Speaking on the subject of exercise of such discretion the court in *Stough v. State*, 128 P. 2d 1028, said:

“It is idle to argue that the discharge of the jury would not materially affect the rights of the defendant. *Has he no right to be heard?* Who can say that he might not have urged some reason which would have influenced the Court in the *exercise* of its *discretion?*”

Discretion to do *what?* To discharge or not to discharge, AND the defendant should have as much right to argue *for* discharge as against it.

See also:

Upchurch v. State, 38 S. W. 206;

State v. Chandler, 274 Pac. 303.

This deprived the defendant of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, and of jury trial guaranteed by the Sixth and Seventh Amendments.

Snyder v. Massachussetts, 290 U. S. 606;

Hopt v. Utah, 110 U. S. 574.

If the right to discharge a juror for illness requires the judge to conduct a proceeding in open court in the presence of the defendant and his counsel then the right to retain an ill juror suffering from nervous exhaustion requires that the defendant and his counsel be promptly informed about the juror's illness and treatment so that he may duly inquire and make appropriate motions or objections to the retention of a juror who is incapacitated and unable to deliberate.

On August 30th, Jury Foreman Andrews, who had been diagnosed as suffering from "nervous exhaustion" twice asked the court to discharge the jury. His request was actually an earnest plea, which the judge ignored—this in the face of knowledge of the juror's illness. Nothing was stated at that time by the judge about the juror having been so ill as to require medical attention. If he would have offered counsel an opportunity to inquire whether juror could go ahead. Usually, even in an emergency, the courts call counsel and apprise them of the situation and receive their consent or disapproval.

The failure to do so deprived the defendant of rights guaranteed by the Fifth and Sixth Amendments of the United States Constitution.

Snyder v. Massachusetts, supra;

Hopt v. Utah, 110 U. S. 574, 578, 579.

The fundamental right of an accused to be present at every stage, especially in Capitol cases, has been stressed by judicial expression.

Snyder v. Massachusetts, 290 U. S. 606, 90 A. L. R. 575;

Hopt v. Utah, 110 U. S. 574;

Schaub v. Berggren, 143 U. S. 444, 448.

The rule may be stated under the Fifth Amendment, the same as the Fourteenth Amendment, that an accused has the privilege to be present whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge (*Snyder v. Massachussetts, supra*).

The right to know about the condition of jurors who may be too ill to deliberate intelligently or satisfactorily is such a substantial right.

Lewis v. U. S., 146 U. S. 370, 36 L. Ed. 1011;

Dowdell v. U. S., 221 U. S. 325, 330.

On motion for a new trial which was denied it developed that while deliberating, William W. Andrews, the foreman of the jury, became ill. Mr. Andrews told one of the jurors he could not reach the light. That it was going round in his head [Rep. Tr. p. 5727] all the time, and he was getting filled up on it and could not permit it or something. He said he was getting tired of the whole thing and it was going around in his mind all the time and he could not sleep. [Rep. Tr. p. 5728.] He sat in the back of the bus; he had been attended by a doctor, Dr. Leo Prager, who diagnosed his case as that of "nervous exhaustion." [Rep. Tr. p. 5709.] He said he had not been able to sleep for the last 48 hours. [Rep. Tr. p. 5709.] He said there was a lot of animosity between him and another juror and he asked that he be placed in the back of the bus so he "won't have to fight with somebody." [Rep. Tr. p. 5711.] The doctor gave him a sedative.

No report was made of this occurrence to the defendant or his counsel, the matter was kept completely confidential between the bailiff and the trial judge. Dr. James R.

Shaw, Dr. Ignacius Sommers attended another juror, Otilia Younger for an ear trouble, with sharp shooting pains. [Rep. Tr. p. 5718.] No report was made of this occurrence either to the defendant or his counsel.

Another juror became ill in the jury room, commenced to cry and other jurors went in and gave her smelling salts. [Rep. Tr. p. 5739.]

The trial judge on motion for new trial, conceded that:

“from the six people from the Marshal’s Office who were in attendance upon this trial, not one of them had ever had any experience with the jury. I asked Judge Harrison if he would lend me the services of his crier. He was the only judge that was here at that time and his crier was the only crier in attendance at the time, and he sent Mr. Sheibe down here to help me out.” [Rep. Tr. p. 5748.]

The judge said before he was awake on Sunday morning the telephone started ringing and he answered it and it was Mr. Sheibe. He told the judge Mr. Andrews was ill, what should he do. The judge said:

“I told him to get the house physician if he could immediately. . . . He reported to me later that some doctor had attended Mr. Andrews and found him nervous and gave him some pills—Phenol-Barbital to take.” [Rep. Tr. p. 5769.]

“I did not think to bother counsel with such a thing as that. It was another the bailiff reported to me about this later juror had some trouble with her ear.”

He instructed the doctor to take care of her.

"*I did not report that to you gentlemen. There were a great many things.*" [Rep. Tr. p. 5770.]

Defense counsel complained on motion for new trial because the judge had not informed him at the time so that the exact condition of Mr. Andrews could then have been determined, and that such procedure denied substantial rights to the defense. [Rep. Tr. p. 5771.] The court said:

"We saw them Monday morning. You saw that argument, in effect almost a quarrel between Mrs. Ziegler and Mr. Andrews." [Rep. Tr. p. 5772.]

The judge inferred that foreman Andrews was upset because of personal differences between him and Mrs. Ziegler. [Rep. Tr. p. 5772.] This did not explain why Mr. Andrews could not see the electric light in his room, *was suffering from nervous exhaustion for 48 hours, and was ready to beat up on somebody.*

When juror Clancy on motion for new trial was pressed to information he had given attorney Morris Lavine after the trial, he became suddenly ill and fainted on the witness stand and had to be carried off and to have the services of two doctors who were in the courtroom, and he was never able to be recalled. [Rep. Tr. p. 5772.]

Another juror, Mrs. Florence Babb, also became ill in the jury room and threw up. [Rep. Tr. p. 5774.] And, while, the jurors were deliberating, and unable to agree on the sixth day of deliberation, after they had reported they were hopelessly deadlocked, a Marine Band suddenly started played *patriotic airs in front of the Federal Building.* [Rep. Tr. p. 5776.] On complaint of the defense counsel, the jurors were taken out another way.

We respectfully submit that the sordid picture of the form and manner and length of the jury's deliberations, the high tension, passion and heat, developed in the jury room, in addition to the weather conditions and all of the surrounding circumstances and the instructions of the court that it was their duty to agree, and to return a verdict after they had twice requested to be discharged, denied to this appellant a fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

The defendant was denied a fair trial guaranteed by the Fifth Amendment to the Constitution in that, during the deliberation of the jury, one or more jurors became ill and a doctor or doctors were called without any notification at any time during the trial to the defendant or his counsel, and without any opportunity to learn the nature of the illness and whether by reason of such illness such juror or jurors became incompetent to deliberate properly.

The trial judge was particularly careful throughout the trial to require that the defendant be present at every state of the proceeding, even at the bench when the jury had been excused; yet, when the jury went out to deliberate and before they returned into court stating it was impossible to continue further, a physician was called to attend a juror or jurors who had become ill during the deliberation, and such attendance was made without any such fact ever being communicated during the trial to either the defendant or his counsel. Had the defendant or his counsel been apprised on Monday morning when the jury returned and stated it was impossible to continue, that on Sunday the foreman of the jury and other jurors had been attended medically by a physician because of the nature of the deliberations, defense counsel would have

been in a position to present forceful and cogent evidence to discharge the jury at that time, and also would have been in a position to determine if alternate jurors were required as the result of the illness of one or more of the jurors. Such information, however, was withheld from the defendant and his counsel.

VIII.

A. The Court Erred in Declining to Poll the Jury as to the Names of the Two Witnesses Who Established the Constitutional Requirement.

When the jury returned into Court after it had sent a message that it had partially arrived at an agreement and had returned its partial verdict, counsel for appellant requested the Court to poll the jury as to the names of the two witnesses whom the jury relied on to establish the overt act. The Court denied the defendant's request. Thereafter it was stipulated that the same request had been made and denied as to each alleged overt act in which agreement was claimed to have been arrived at.

The Court denied the request as to each alleged overt act. It was stipulated that the request might be deemed to have been made as to polling the jury as to every such act.

One of the purposes of polling the jury where special verdicts have been returned in addition to a general verdict is to determine if the general verdict has actually been based upon the facts as found by the jury. If the special verdict is contrary to the general verdict, a new trial is required.

Inasmuch as there were several witnesses to each of the overt acts it may be that some of the jurors believed that

two certain witnesses proved the particular overt act while some of the jurors believed that two different witnesses proved the overt act. With this uncertainty in the record it is impossible to ascertain if the defendant has been convicted by the two witness requirements of the Constitution.

This was highly prejudicial error.

Where the only crime mentioned in the Constitution is specifically defined and the quantum of evidence that is required is therein specified (Art. III, Sec. 3, U. S. Constitution), and the court has requested special verdicts which do not sufficiently establish the constitutional requirement, a request to poll the jury specifically to determine if there has been unanimity or sufficient proof is necessary. Where, as here, there have been several witnesses to the alleged overt act or parts of the alleged overt act, one juror might have believed one witness but disbelieved another, and another juror vice versa. What the Constitution requires is unanimity by the jury as to the same witnesses to the alleged overt act and that these same witnesses be at least two in number to the whole of the overt act, or the same two in number to such parts of the alleged overt act as would form a chain in the whole of the overt act.

Cramer v. United States, 325 U. S. 1, 89 L. Ed. 144;

Haupt v. United States, 330 U. S. 631, 91 L. Ed. 1145.

It was the right of the defendant to have the court poll the jury to determine if this quantum of evidence had actually been relied on by the jury so as to determine if the general verdict was actually based upon the special findings of the jury as to unanimity.

(B) The Return of the Jury Without a Unanimous Verdict on the Whole of the Indictment as Alleged Was Necessary Unless the Government Withdrew the Overt Acts Before Submission to the Jury.

The indictment in this case alleged a continuation of the treason from October, 1944 until August, 1945.

The prosecution withdrew one overt act and the court dismissed another overt act, but there was no withdrawal of the other overt act. Therefore, it was necessary for the prosecution to prove the essential elements of the indictment as laid and its continuous character so alleged in the indictment as to each and all of the acts. It was, therefore, mandatory for the jury to return a verdict as to the whole of the indictment which had not been withdrawn, or the result was necessarily a disagreement by the jury. Proof of parts of the overt acts did not prove the indictment as laid and as submitted to the jury.

When the jury reported finally after eight days of deliberation that they were ready to return into court and stated that they had arrived at an agreement as to some of the overt acts, the court requested the prosecution if it wished to withdraw some of the overt acts. The Government did not do so. Thereafter the jury was permitted to return the indictment as submitted to the jury without the withdrawal of any of the overt acts.

It is respectfully submitted that the jury was at that time a disagreed jury and not an unanimous jury to the indictment as specified.

Andres v. U. S., 333 U. S. 740.

(C) The Case Actually Resulted in a Mistrial.

Although the jury returned a general verdict in this case, there were several special verdicts submitted to them for their consideration. It was therefore the right of the defendant to have a unanimous decision by the jury on each of the special findings submitted to them. Failure to find on those special issues—one way or another—resulted actually in a hung jury.*

When the jury returned into court for further deliberation, the appellant demanded that the jury be returned for further deliberation and for final determination of the issues. The court asked the jurors if they wished to return and they stated they did not. There were five issues left without any agreement or without returning any verdicts thereon. We submit that this resulted in a hung jury and that the court, therefore, had no right to discharge the jury under such a situation.

In *Andres v. United States*, 333 U. S. 740, 92 L. Ed. 1055, 333 U. S., page 748, the court said:

“Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply.” (See *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. Ed. 1079.)

*At the time the jury came in the defendant objected to the discharge of the jury without reaching a unanimous agreement to the remaining special verdicts as to alleged overt acts (e), (f), (h), (l) and (o). The court inquired of the jurors whether they believed they could reach a verdict by further deliberation as to said special verdicts and the jurors state “they do not,” no juror stating that he desired to deliberate further. [Clk. Tr. p. 3(a).]

It must be seen that the Court left the question of going back to deliberate further to the jury, and did not withdraw any of the overt acts named.

“In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it.”

In Justice Frankfurter’s concurring opinion in *Andres v. United States*, 333 U. S. 763, the court said:

“‘Until the twelve judges have agreed on every part of the verdict they have not agreed on any verdict.’ (*Id.* 287 N. Y. at 171, 38 N. E. 2d 482, 138 A. L. R. 1222.)”

It is respectfully submitted that when the jury so reported to the court, the court should have sent them back to determine every other issue of the case—either affirmatively or negatively—and that its failure to do so actually resulted in a hung jury in this case.

Andres v. United States, 333 U. S. 740.

The discharge of the jury over the objections of the defendant and without an agreement, therefore, constituted jeopardy which actually constituted an acquittal in this case.

IX.

When the Trial Court Therefore Discharged the Jury Without Consent of the Defendant and Over His Objections Before a Unanimous Verdict Had Been Reached on Each of the Issues Was in Fact an Acquittal.

Ex parte Lange, 18 Wall. 872;

People v. Webb, 38 Cal. 476;

People v. Hunckler, 48 Cal. 331.

X.

The Court Erred in Permitting the Prosecutor to Add Different and New Overt Acts During the Course of the Trial in His Bill of Particulars. The Object of the Bill of Particulars Was to Furnish the Information to the Defendant Before Trial—Not After Trial.

The Court permitted names to be added during the trial to each of the overt acts. This was over the objections of the defense [Clk. Tr. 89]. While these were names of persons heretofore supplied the defense, they were to different overt acts. It was in the middle of the trial. The defense had no opportunity at this stage to investigate the new information.

The object of a Bill of Particulars is to enable a defendant to be prepared for trial; not to supply him information after the trial.

Rule 7(f), *Rules of Criminal Procedure*.

Rule 7(f) of the Rules of Criminal Procedure reads as follows:

“(f) BILL OF PARTICULARS. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.”

Glasser v. United States, 86 L. Ed. 680;

Barnard v. United States, 16 F. 2d 451, Cert. denied, 274 U. S. 736.

XI.

The Court in Considering Punishment Apparently Was Influenced by Matters of Which There Was Absolutely No Evidence and Which Were Argued Previously on the Motion for a New Trial.

The Court said:

“Like Hans Haupt, the defendant in *Haupt v. United States*, 330 U. S. 631 (1947), the defendant gave every aid and comfort to the enemy that he was able to give. And the evidence compels the conclusion that what the defendant was able to do, with his brutal, slave-driving tactics, added many tons of nickel ore to Japan’s war effort that would never otherwise have been mined or smelted by American prisoners of war.” [Rep. Tr. p. 5825, lines 6-13.]

This was certainly a fallacious conclusion. The only acts relating to the defendant adding any tons of nickel ore to Japan’s war effort were not involved in this case. Not a single overt act found by the jury established that Kawakita added a single ounce of nickel ore to Japan’s war effort. As we have heretofore pointed out, five of the alleged overt acts were in aid of the Military in punishing Americans for crimes committed against laws of Japan and against the military authorities in the prisoner of war camp and at a time when Americans were no longer working in the mine. Another was in compelling a man to work who was not working. The other was in carrying a second bucket of paint. The other act was in not rendering medical aid and the other act was also a punishment act.

If there was any evidence that Kawakita added one ounce of nickel ore to Japan’s war effort, we have failed to find it. That was the government’s theory at the outset

of the case in bringing the charges. But, when it appeared that the defendant had been drafted to work in the Camp, this fact disappeared from the case and Overt Acts (m) and (n), on which these charges were based, were withdrawn. Nevertheless, it seems still to inhere in the court's mind at the time of the consideration of the Motion for a New Trial and was referred to indirectly at the time of judgment and sentence. The judgment was indeed arbitrary and capricious and not founded on a single fact present in the case.

That the court, therefore, took into consideration in pronouncing the death sentence a fact not proved requires the arbitrary judgment to be set aside.

XII.

The Trial Judge Erred in Its Arbitrary Imposition of the Sentence of Death Upon the Appellant.

The judge's reason for imposing the death penalty is expressed by him [Rep. Tr. p. 5856], as follows:

"If this defendant were to go from this court a free man, he would be condemned to live out his life in bitter scorn of himself. . . . These thoughts, and others, many of which were mentioned by you, Mr. Lavine, must tell the defendant that his life if spared would not be worth living. Considering the inherent nature of treason and the purpose of the law in imposing punishment for the crime, the reflection leads to the conclusion *that the only worth while use for the life of a traitor such as this* defendant has proved himself to be is to serve as an example to those of weak moral fiber who may hereafter be tempted to commit treason against the United States." [Rep. Tr. p. 5857.] (Italics ours.)

The judge then imposed judgment.

In fixing the punishment for treason Congress apparently did not agree with the trial judge. Neither did the framers of Constitution. The latter did not put any punishment in the Constitutional definition of treason. Mr. Justice Jackson, in *Cramer v. United States*, 325 U. S. 1, 24, said:

“Distrust of treason prosecutions was not just a transient mood of the Revolutionists. In the century and a half of our national existence *not one execution on a Federal treason conviction* has taken place. Never before had this court had occasion to review a conviction.” (Italics ours.)

And, in a footnote of *Cramer v. United States*, 325 U. S. 1, 14, the court pointed out that every member of the Constitutional Convention “could have been prosecuted and might have been convicted as ‘traitors’ under the British Law of constructive treason. It was in this setting that Congress adopted the law of Treason and the punishment for it, fixing it at not less than five years and the maximum of death. The Congress of the United States in its legislative policy and our own history is contrary to the arbitrary finding of the judge that the law makers fixed the policy that

“the only worth while use for the life of a traitor is to serve as an example to those of weak moral fiber who may hereafter be tempted to commit treason against the United States.”

Such arbitrary action is a condemnation of the Legislative policy by the Congress of the United States and the historical policy of the United States in treason cases. It is arbitrary and capricious.

In the *Cramer* case, which was later set aside, the judge fixed the punishment at 45 years. In the *Haupt* case the

judge fixed the penalty at life. In the *Tokyo Rose* case the judge fixed the penalty of ten years. In the *Chandler* case the court fixed the penalty of life. And, in the "*Axis Sally*" case in Washington the court fixed the punishment for fifteen years.

As said by the Court in *Cramer v. United States*, quoting from Payne:

"He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself. We still put trust in it."

Conclusion.

TOMOYA KAWAKITA went to Japan as a boy, full of ambition to learn and improve himself. He was caught in the maelstrom of a great war. To paraphrase the language of *Chandler v. United States*, his acts were performed under war time stress and duress; he was drafted by the foreign government as one of its citizens, and he was under enemy compulsion. In order to earn a living, he accepted employment for which he was later drafted "in these days of total war."*

*In *Chandler v. United States*, 171 F. 2d at page 945, the court said:

"The present case involves no problem of acts of *aid and comfort performed under enemy duress*. Chandler was not under enemy compulsion; upon the contrary it was he who sought employment with the Short Wave Station. Nor does the present case necessitate any detailed examination as to how far an American citizen, *caught in an enemy country at the outbreak of war*, may, *in order to earn a living* and without the stigma of treason, accept employment which in these days of total war might conceivably be of some aid in the enemy war effort. Here, as elsewhere in the law, there may be troublesome questions of degree."

In this setting Kawakita was not guilty of any treason at all. As a Japanese citizen, he owed total loyalty to the Government of Japan, which was giving him its protection and of whose citizenship he was one.

The overt acts, in their setting, were trivial. We believe the accounts of the men were exaggerated, and contradictory and unsubstantial. Of a total period of one year covered by the indictment, the government was only able to find fifteen trivial acts of which they thought sufficient to base an indictment upon. Most of them were punishments imposed by the military authorities in its conduct of the camp under national law; two were withdrawn; five others were not found by the jury, and eight were found against the defendant by the jury. Of these eight, five allegedly consisted of assisting the local military authorities in administering punishments for serious offenses against the internal laws of Japan and the military laws of the prisoner of war camp. One was in not giving medical attention as quickly as prisoners of war thought desirable, and only two of those acts remaining were acts claimed to cause anyone to exert himself toward effort or greater efforts. The Toland incident was based on conflicting testimony, as it was shown by the testimony of Doctor Bleich that at that time and on that date Toland was doing "light duty" adjoining the camp in the garden, and was not doing any work removing rock at all. Others were also conflicting and uncertain as to times, places, and dates. The crowning piece of allegation

of treason was that Kawakita caused a man to carry two buckets of paint when the man was only carrying one bucket—at a time when he was supposed to be carrying two buckets of paint.

For these alleged trivial “overt” acts, in this untreasonous setting, the trial judge imposed the *death* penalty.

In the setting there was no treason.

We respectfully pray for reversal on each and all of the grounds set out in this brief, and for an order directing a discharge of the defendant.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant Tomoya Kawakita.



APPENDIX.

A.

Article III, Section 3, Constitution of the United States of America.

“Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”

B.

Title 18, Section 1 United States Code (1946 Edition).

“Section 1. (Criminal Code, section 1.) Treason. Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason. (Mar. 4, 1909, ch. 321, Sec. 1, 35 Stat. 1088.)”

C.

Title 28, Section 102, United States Code (1946 Edition).

“Section 102. (Judicial Code, Section 41.) Offenses on the high seas.

The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought. (Mar. 3, 1911, ch. 231, Sec. 41, 36 Stat. 1100.)”

D.

Article VI of the Constitution of the United States
Paragraph Two, Provides:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”
[See Defendant’s Exhibits CT and CW and exchange of letters and telegrams between the United States and Japan relating to Treaties regarding the Prisoners of War Camps.]

Exhibit CW is a letter from the Department of State as follows (the copies of agreements and proclamations referred to are in the original Exhibits with the Court and are not recopied here):

“My Dear Mr. Lavine:

“Reference is made to your letter of June 21, 1948, and our telephone conversation of July 2, 1948, regarding the meaning of the words “mutatis mutandis” and of the statement that “. . . Although not bound by the Convention relative treatment prisoners of war Japan will apply mutatis mutandis provisions of that Convention to American prisoners of war in its power.” Reference also is made to your letter of June 24, 1948 requesting certified copies of agreements concerning the trial of Japanese or others for war crimes.

“In accordance with our conversation, I enclose herewith certified copies of telegrams sent and received by the Department concerning the arrangements made between the United States Government and the Japanese Government with regard to the treatment of prisoners of war and civilian internees and the application of the convention relating to the treatment of prisoners of war, signed at

Geneva on July 27, 1929. Your attention is invited particularly to telegram no. 376, February 7, 1942 to the American Legation at Bern, and to telegram no. 733, February 24, 1942 from the American Legation at Bern, the second paragraph of which refers to the Japanese Government's declaration that it will apply, on condition of reciprocity, the Geneva Prisoners of War Convention in the treatment of prisoners of war and, in so far as the provisions of the Convention shall be applicable, in the treatment of civilian internees, and that the latter shall not be forced to perform to perform labor against their will. On the basis of these arrangements, made with the Japanese Government through the Swiss Government, concerning the treatment of prisoners of war and civilian internees, this Government considers that there was a binding commitment on the part of Japan to apply the provisions of the Geneva Convention to American prisoners of war.

In accordance with the request in your letter of June 24, 1948 there are enclosed also certified copies of the international agreements and proclamations relating to the trial of war criminals.

Sincerely yours,

For the Secretary of State:

BRYTON BARRON

BRYTON BARRON

Assistant for Treaty Affairs

Office of the Legal Adviser

Enclosures:

1. Certified copies
of telegrams.
2. Certified copies of
agreements and proclamations.

E.

Treaty Series No. 539—Convention Between The
United States and Other Powers, Provides as
Follows:

“Article 4. Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.” [Exhibit CR.]

* * * * *

“Article 6. The State may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the State is paid at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.

When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position and the balance shall be paid them on their release, after deducting the cost of their maintenance.” [Exhibit CR.]

“Article 7. The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In the absence of a special agreement between the belligerents prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.” [Exhibit CR.]

“Article 8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.” [Exhibit CR.]

Treaty Series, No. 846, Regarding the Conduct of Prisoners of War—Convention between the United States of America and other Powers.

Chapter 3. *Penalties Applicable to Prisoners of War*, Article 45, provides as follows:

“Prisoners of war shall be subject to the laws, regulations, and orders in force in the armies of the detaining power.

An act of insubordination shall justify the adoption towards them of the measures provided by such laws, regulations and orders.”

Trial by Consuls in Japan.

Title 22, U. S. Codes Annotated provides:

“Section 141. Judicial authority generally. To carry into full effect the provisions of the treaties of the United States with certain foreign countries, the ministers and consuls of the United States in China, Siam, Turkey, Morocco, Muscat, Abyssinia, Persia, and the territories formerly a part of the former Ottoman Empire including Egypt, duly appointed to reside therein, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with judicial authority described in this chapter, which shall appertain to the office of minister and consul, and be a part of the duties belonging thereto, wherein, and so far as, the same is allowed by treaty, and in accordance with the usages of the countries in their intercourse with the Franks or other foreign Christian nations. (R. S. §§4083, 4125, 4126; June 14, 1878, c. 193, 20 Stat. 131.)” (Note: Japan was added by treaties in 1857-1858.)

“Section 142. General jurisdiction in criminal cases. The officers mentioned in the preceding section are fully empowered to arraign and try, in the manner provided in this chapter, all citizens of the United States charged with offenses against law, committed in such countries, respectively, and to sentence such offenders in the manner in this chapter authorized; and each of them is authorized to issue all such processes as are suitable and necessary to carry this authority into execution. (R. S. §4084.)”

“Section 145. System of laws to be applied. Jurisdiction in both criminal and civil matters shall, in all cases,

be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies. (R. S. §4086.)”

(United States Code Annotated, Title 22, Chapter 2, pages 70, 71, 72 and 74.)

Treaties.

Treaties between Japan and the United States.

The treaty of June 17, 1857, executed by the consul-general of the United States and the governors of Simoda, is the one which first conceded to the American consul in Japan authority to try Americans committing offenses in that country. Article IV of that Treaty is as follows:

“Art. IV. Americans committing offenses in Japan shall be tried by the American consul-general or consul, and shall be punished according to American laws. Japanese committing offenses against Americans shall be tried

by the Japanese authorities, and punished according to Japanese laws." (11 Stat. 723.)

The Treaty with Japan of July 29, 1858, in some particulars changes the phraseology of the concession of judicial authority to the American consul in Japan, but, as we shall see subsequently, without revocation of the concession itself. Its sixth article is as follows:

"Art. VI. Americans committing offenses against Japanese shall be tried in America consular courts, and when guilty shall be punished according to American law. Japanese committing offenses against Americans shall be tried by the Japanese authorities and punished according to Japanese law. The consular courts shall be open to Japanese creditors, to enable them to recover their just claims against American citizens and the Japanese courts shall in like manner be open to American citizens for the recovery of their just claims against Japanese." (12 Stat. 1056.)

As will be seen, the language of the fourth article of the Treaty of 1857 is that "Americans committing offenses in Japan shall be tried," etc.; while the language of the sixth article of the Treaty of 1858 is that "Americans committing offenses against Japanese shall be tried," etc. Offenses committed in Japan and offenses committed against Japanese are not necessarily identical in meaning. The latter standing by itself would require a more restricted construction. But the twelfth article of that Treaty obviates that. It is as follows:

"Art. XII. Such of the provisions of the Treaty made by Commodore Perry, and signed at Kanagawa on the 1st of March, 1854, as conflict with the provisions of this Treaty are hereby revoked; and as all the provisions of

a Convention executed by the consul-general of the United States and the governors of Simoda, on the 17th day of June, 1857, are incorporated in this Treaty, that Convention is also revoked."

It will thus be perceived that the revocation of the Treaty of 1857 was upon the assumption and declaration that all its provisions were incorporated into the Treaty of 1858.

The war between the United States and Japan did not abrogate the treaty between those two countries.

Clark, Attorney General v. Allen, 331 U. S. 503;

Society for the Propagation of the Gospel v. New Haven, 8 Wheat, 464, 494.

The fact that Japan was under a military government from August 15, 1945, would not have precluded it from performing its obligations under a previous treaty.

Neely v. Henkel, 180 U. S. 109, 120.

It is clear that treaties may "confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limitations of the other" which will be enforced by the Courts.

Edye v. Robertson, 112 U. S. 580;

United States v. Rauscher, 119 U. S. 407;

Johnson v. Browne, 205 U. S. 309;

Cook v. United States, 288 U. S. 102, 121;

Ford v. United States, 273 U. S. 593;

United States v. Schonweiler, 19 F. 2d 387;

United States v. Ferris, 19 F. 2d 925.

F.

U. S. C. A. Title 8, Sec. 800. Right of Expatriation.

“Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic. R. S. Sec. 1999.

G.

U. S. C. A. Title 8, Sec. 801. General Means of Losing United States Nationality.

“A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: *Provided, however,* That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: *Pro-*

vided further, That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of his¹ chapter to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship; or

(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

¹So in original. Probably should read "this."

(f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction. Oct. 14, 1940, c. 876, Title I, Subchap. IV, Sec. 401, 54 Stat. 1168.”

H.

U. S. C. A. Title 8, Sec. 802. Presumption of Expatriation.

“A national of the United States who was born in the United States or who was born in any place outside of the jurisdiction of the United States of a parent who was born in the United States, shall be presumed to have expatriated himself under subsection (c) or (d) of section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, or within any place under control of such foreign state, and such presumption shall exist until overcome whether or not the individual has returned to the United States. Such presumption may be overcome on the

presentation of satisfactory evidence to a diplomatic or consular officer of the United States, or to an immigration officer of the United States, under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. However, no such presumption shall arise with respect to any officer or employee of the United States while serving abroad as such officer or employee, nor to any accompanying member of his family. Oct. 14, 1940, c. 876, Title I, Subchap. IV, Sec. 402, 54 Stat. 1169.” (Emphasis ours.)

I.

U. S. C. A. Title 8, Sec. 803. Restrictions on Expatriation; Residence in United States; Age.

“(a) Except as provided in subsections (g) and (h) of section 801, no national can expatriate himself, or be expatriated, under this section while within the United States or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this section if and when the national thereafter takes up a residence abroad.

(b) No national under eighteen years of age can expatriate himself under subsections (b) to (g), inclusive, of section 801. Oct. 14, 1940, c. 876, Title I, Subchap. IV, Sec. 403, 54 Stat. 1169.”

J.

U. S. C. A. Title 8, Sec. 804. Expatriation of Naturalized Nationals by Residence Abroad.

“A person who has become a national by naturalization shall lose his nationality by:

(a) Residing for at least two years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, if he acquires through such residence the nationality of such foreign state by operation of the law thereof; or

(b) Residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 806 hereof.

(c) Residing continuously for five years in any other foreign state, except as provided in section 806 hereof. Oct. 14, 1940, c. 876, Title I, Subchap. IV, Sec. 404, 54 Stat. 1170.”

* * * * *

K.

U. S. C. A. Title 8, Sec. 808. Exclusiveness of Means of Losing Nationality.

“The loss of nationality under this chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter. Oct. 14, 1940, c. 876, Title I, Subchap. IV, Sec. 408, 54 Stat. 1171.”

L.

Immigration and Nationality Regulations.

"315.9. *When evidence overcomes presumption; effect of decision.* When the United States diplomatic or consular officer or immigration officer is satisfied that the evidence presented overcomes the presumption of expatriation under section 402 of the Nationality Act of 1940, the United States passport or other travel document of the person shall be endorsed by or on the part of such officer with a certificate as follows:

I certify that the holder of this (passport) has submitted to me evidence which I believe to be sufficient to overcome, *as of this date*, the presumption of expatriation under section 402 of the Nationality Act of 1940." (Italics ours.) (*Immigration and Nationality Regulations*, Section 315.9.)

M-1.

The Bulletin of the State Department Containing Information for Bearers of Passports Contains the Following Administrative Statement Regarding Dual Nationality:

"20. Dual Nationality.

Persons born in the United States of unnaturalized parents acquire the nationality of the country of which their parents are nationals. Often foreign nationality is retained notwithstanding the subsequent naturalization as citizens of the United States. A person possessing the nationality of both the United States and a foreign country, who habitually resides in the territory of such foreign country and who is in fact most closely connected with that country should not expect to receive the protection of this Government while he is residing in such country,

and it is not the practice of the Department to make representations in his behalf with a view to his release from the performance of military or other obligations to the foreign country." [Exhibit DR.]

M.

Abstract of Passport Laws and Precedents

(Passport Division Office Instructions)

SECTION I

Code No. 1.6

May 19, 1941

SUBJECT: DUAL ALLEGIANCE (Supersedes code of same number dated July 30, 1937.)

1. *General.* There is no uniform rule of international law covering the subject of citizenship. Every nation holds for itself who shall, and who shall not, be its citizens. According to the law of some states, citizenship by birth depends upon the place of birth. This is the *jus soli*, or common law doctrine. According to the law of other states, citizenship depends upon the nationality of the parents. This is the *jus sanguinis*,—sometimes erroneously termed the doctrine of the law of nations, because it obtains in many countries. In some countries both elements exist, the one or the other, however, predominating. By the law of the United States, citizenship depends, generally, on the place of birth; nevertheless the children of citizens, born out of the jurisdiction of the United States, are also citizens. The existence of these two doctrines, side by side, in this country, is the cause of much of the confusion which has arisen in relation to citizenship in the United States. (Van Dyne, *Citizenship of the United States*, pp. 3-4.)

The principles of *jus soli* and *jus sanguinis* are followed to a large extent by the United States. How-

ever, it should be observed that neither of the two doctrines is adhered to in its fullest extent in the United States. The confusion growing out of the existence of these distinct doctrines of nationality has been the cause of numerous difficulties which have arisen from time to time between the United States and foreign countries because of the conflict in the bases of the laws pertaining to nationality. While a person who has dual nationality resides in the United States, the right of the United States to his allegiance is paramount to the right of the other country of which he may be a citizen. Conversely, while a person who has dual allegiance is residing abroad in the country to which he owes allegiance is paramount to that of the United States. However, it has been the policy of this Government when occasion arises to intercede in behalf of a person who has dual allegiance, one of which is American, when the facts clearly indicate that his habitual place of abode over a period of years has been in the United States and he has been molested by the authorities of the foreign country of which he is also a citizen while temporarily visiting or sojourning in such country.

2. *Registration and issue of passports abroad in dual nationality cases.* In general, in the case of a person who acquired at birth the nationality of the United States and of a foreign state, a passport may be authorized for use in traveling forthwith to the United States for permanent residence, unless, of course, such individual has lost his American nationality under the first paragraph of Section 2 of the Act of March 2, 1907, or Chapter IV of the Nationality Act of 1940, without regard to the length of his foreign residence. However, if such a person has reached

the age of majority and is domiciled in the foreign country of which he is a national, and applies for a passport, not for the purpose of coming to the United States to reside, but for the purpose of continuing his residence indefinitely in such other country, a passport will not as a rule be issued.

Passports will, as a general rule, be issued to persons residing in a country other than the country of their parent's nativity for further residence abroad unless facts in the case other than the fact of mere residence make it inadvisable to issue passports to such persons. Of course, if the residence abroad has been extended for such a period that it is indicated that residence in and allegiance to the United States have been abandoned, a passport should not be issued.

The same principles as apply with respect to applications for passports shall apply also to applications for registration.

R. B. SHIPLEY,
Chief, Passport Division

PD

Department of State, U. S. A.
Washington 25, D. C.

Official Business

[Stamped]: Washington, D. C. 28, Aug. 13, 11 P. M.
1948

Mr. Morris Lavine,
Care of the Clerk of the United States District Court,
Los Angeles, California

See *Perkins v. Elg*, 307 U. S. 325; *Savornan v. U. S. A.*, 94 L. Ed. (Adv.) 203.

N-1.

The language and face of the indictment, starting with the beginning of the indictment to the overt acts is as follows:

In the District Court of the United States in and for the Southern District of California Central Division.

United States of America, Plaintiff, v. Tomoya Kawakita, Defendant. No. 19665.

INDICTMENT

(U. S. C., Title 18, Sec. 1; U. S. C.,
Title 28, Sec. 102—TREASON)

The grand jury for the Southern District of California, Central Division, having been impanelled for the February, 1947 term, and having commenced an investigation concerning the matters contained in this indictment, and not having completed the same during said term, and not having been discharged, and a District Judge having upon request of the District Attorney by order authorized said grand jury to continue to sit during the term succeeding the February 1947 term to finish the investigation theretofore begun, now returns this indictment pursuant to Title 28, U. S. Code, Sec. 421 and Rule 6 of the Rules of Criminal Procedure for the District Courts of the United States.

The grand jury charges:

(1) TOMOYA KAWAKITA, the defendant herein, was born at Calexico, California, on September 26, 1921, and he has been at all times herein mentioned and now is a citizen of the United States of America and a person owing allegiance to the United States of America.

(2) At all times mentioned herein Camp Oeyama was a camp for prisoners of war maintained by the Japanese Government and located on the Island of Honshu, Japan;

At all times mentioned herein Nippon Yakin Kogyo Kabushiki Kaisha was a corporation organized and existing under and by virtue of the laws of Japan, and also known as the Nippon Metallurgical Industry Co., Ltd., and will be hereinafter referred to as the company; that the company owned, operated and controlled on the Island of Honshu near Camp Oeyama an open pit ore mine, and an ore smelter commonly referred to as the "factory."

That during the times referred to herein the work and services of prisoners of war who were members of the armed forces of the United States, and who were imprisoned at Camp Oeyama, were used and utilized by the company and by the Japanese government at the said open pit ore mine and at the smelter.

That at all times mentioned herein the company was engaged in the business of producing and supplying minerals and products to agencies of the Japanese government and that the minerals and products of said open pit ore mine and the said smelter produced by the company were used in the manufacture of arms, materials and munitions of war by and for the Japanese government.

(3) The defendant TOMOYA KAWAKITA, at and near the said Camp Oeyama and said open pit ore mine and smelter in Japan, and outside the jurisdiction of any particular state and district of the United States, continuously and at all times from August 8, 1944, up to and including August 24, 1945, under the circumstances and conditions and in the manner and by the means hereinafter set forth, he then and there, being a citizen of the United States and a person owing allegiance to the United States, in violation

of said duty of allegiance, did knowingly, intentionally, willfully, and unlawfully, feloniously, traitorously, and treasonably adhere to the enemies of the United States and more particularly namely: the Government of Japan, with which the United States at all times since December 8, 1941, and during the times set forth in this indictment, has been at war, giving to the said enemies of the United States aid and comfort in Japan, that is to say:

(4) The aforesaid adherence of said defendant TOMOYA KAWAKITA and the giving of aid and comfort by him to the aforesaid enemies of the United States during the period aforesaid consisted of serving as interpreter and foreman at the said prisoner of war camp at Oeyama and at the said open pit ore mine and smelter, and, in his said capacity as interpreter and foreman, of compelling members of the armed forces of the United States who were then and there held by the Japanese Government as prisoners of war to perform labor at the said open pit ore mine and smelter, and of directing and assisting the Japanese military forces having charge of the prisoners of war at said Camp Oeyama in the imposition of discipline and punishment on said members of the armed forces of the United States, and of beating, abusing, and attempting to destroy the morale and the physical and mental well-being of, the said members of the armed forces of the United States.

The aforesaid activities of said defendant TOMOYA KAWAKITA were intended to and did assist the Japanese Government to utilize members of the armed forces of the United States to produce minerals, metals, and products to be used in the manufacture of arms, material, and munitions of war for the Japanese Government and were further intended to and did assist the Japanese military au-

thorities to control and discipline members of the armed forces of the United States who were then and there prisoners of war at said Camp Oeyama and to render them abjectly subservient.

(5) The said defendant TOMOYA KAWAKITA, in the prosecution, performance, and execution of said treason and of said unlawful, traitorous, and treasonable adhering and giving aid and comfort to the enemies of the United States aforesaid, at the several times hereinafter set forth in the specifications hereof (being times when the United States was at war with the Government of Japan), did unlawfully, feloniously, traitorously, and treasonably, and with treasonable intent to adhere to and give aid and comfort to said enemies, perform, do, and commit certain overt and manifest acts which gave aid and comfort to said enemies, that is to say:

N-2.

The Eight Overt Acts Found by the Jury.

(a) Defendant, TOMOYA KAWAKITA, on a date in May, 1945, the exact date of which is to the grand jury unknown, at the said smelter operated by the company near Camp Oeyama, did direct the work of Phillip D. Toland, a member of the armed forces of the United States who was then and there a prisoner of war, to compel him to remove rock from the roadbed and track of a railroad used in the operation of said smelter, and did kick the said Phillip D. Toland to compel him to greater exertion in said work.

(b) Defendant TOMOYA KAWAKITA, during the latter part of April, 1945, the exact date of which is to the grand jury unknown, at said Camp Oeyama did direct and participate in the following inhuman and degrading punishment of one, J. C. Grant, a member of the armed forces of the United States who was then and there a prisoner of war at said Camp Oeyama; said J. C. Grant was knocked into the drain or cesspool of said camp by his Japanese guards and was repeatedly and violently struck and beaten by the defendant and the said Japanese guards as he attempted to get out of the pool, thereby sustaining injuries, shock and exposure.

(c) During December, 1944, at Camp Oeyama, on a date to the grand jury unknown, the defendant TOMOYA KAWAKITA and the Japanese guards did line up about thirty members of the armed forces of the United States who were then and there prisoners of war in Camp Oeyama and as punishment of said prisoners of war for making mittens and shoe linings from pieces of blankets for protection from cold weather conditions and did at said time and place strike and beat them and force them to strike and beat each other.

(d) During August, 1945, the exact date of which to the grand jury is unknown, the defendant TOMOYA KAWAKITA, at Camp Oeyama, did impose punishment on one Thomas J. O'Connor, a member of the armed forces of the United States and then and there a prisoner of war in said camp, for a breach of camp rules by assaulting, striking, and beating said Thomas J. O'Connor and re-

peatedly knocking him into the drain or cesspool of the said camp, causing the said Thomas J. O'Connor temporarily to lose his reason.

(g) On a date in July or August, 1945, the exact date of which is to the grand jury unknown, a work detail consisting of members of the armed forces of the United States who were then and there prisoners of war at said Camp Oeyama, including in their number one David R. Carrier and George W. Simpson, returned thirty minutes early from their assigned duties as such prisoners of war and were compelled by the Japanese sergeant in charge to run twice around the inner quadrangle of the buildings of said camp and thereafter the defendant TOMOYA KAWAKITA did compel the said David R. Carrier and George W. Simpson, who were unable to run fast enough by reason of illness resulting from their captivity, to run an additional four times and six times respectively around said quadrangle of said camp.

(i) That on or about December 17, 1944, at or near the said open pit ore mine, the defendant, TOMOYA KAWAKITA, did order and compel Johnie T. Carter, then and there a member of the armed forces of the United States and a prisoner of war at Camp Oeyama, to carry a heavy log up an ice-covered slope; that the said Johnie T. Carter, who was then and there suffering from malnutrition and in a weakened physical condition, slipped and fell and received a serious spinal injury; that the defendant, TOMOYA KAWAKITA, then and there denied medical care

to the said Johnie T. Carter and delayed his removal to Camp Oeyama for a period of approximately five hours.

(j) On a date in May, 1945, the exact date of which is to the grand jury unknown, the defendant TOMOYA KAWAKITA, at a warehouse near Camp Oeyama, did order and commit John J. Armellino, a member of the armed forces of the United States, who was then and there a prisoner of war at said Camp Oeyama, and weak and emaciated, to carry for a distance of approximately 500 feet two heavy buckets of white lead instead of one bucket which Armellino had been carrying, and did then and there strike and beat the said John J. Armellino in order to compel him to perform this labor.

(k) That on a date in the late spring or early summer of 1945, the exact date of which is to the grand jury unknown, the defendant, TOMOYA KAWAKITA, within the confines of Camp Oeyama, did participate in and assist Japanese military personnel of Camp Oeyama in directing and executing the following cruel, inhuman, and degrading punishment of Woodrow T. Shaffer, a member of the armed forces of the United States who was then and there a prisoner of war of the Japanese government at Camp Oeyama, to-wit, the said Woodrow T. Shaffer was forced to kneel for several hours on a platform with a stick of bamboo placed on the inner side of the joints of his knees and to hold at arms length above his head a bucket of water and subsequently a heavy log, and was then and there struck and beaten by the said TOMOYA KAWAKITA.

O.

Summary of the Testimony and Page References as
to Each Overt Act.

NOTE: All references to Rep. Tr. are the page where the testimony as to that incident begins.

OVERT ACT (a).

*PHILIP D. TOLAND (Overt Act A)

Philip D. Toland testified [Rep. Tr. 1642] that around the springtime of 1945, approximately the month of June, at a point which he marked with a "T" [marked Exhibit A] on the map, he was working on a detail, lifting ore rock away from the track and keeping it clear for the other trains to get by, and he slowed down for a moment. He said he got a dizzy spell and Kawakita came up and told him to get to work, and kicked him, and he fell on his face, cut it and the palm of his hand. [R. 1644.] He said Spurlock came up to pick him up and Kawakita said "let him pick himself up." On cross-examination he said he was working on the garden detail and also on the ore work detail in 1945, and that he was quite sick. [R. 1667.] He said Dr. Bleich examined him and treated him, and that he answered sick call the night before [R.

*It will be seen from the above that no two people identified point "T" as the place where the alleged overt act occurred; that no two persons fixed the specific time, day or date when it occurred; it was always "around May" or "approximately May 15, 1945" or around about the Spring, etc., and according to Toland he was the only one who fixed it in June. While the card records of Dr. Bleich show that from April 21, 1945 until the close of the fighting that Toland was working on the garden detail and was not lifting any ore rock at all.

This character of testimony certainly is not the *two direct witness* type of testimony which the Constitution requires to be proved with specificity beyond a reasonable doubt.

1669]. That the work hours were that they left the camp about seven o'clock in the morning [R. 1669] in military formation, and would go to the factory area when they worked in the factory area [R. 1670]. That at the time of the alleged occurrence, he had stopped working and was doing nothing. He had just got a dizzy spell and stood up for a moment until he got over it [R. 1670]; that this took about three minutes, and during the three minutes he was not working [R. 1671]. It was in the afternoon. He did not recall whether he had seen Sgt. Ichaba (the Sergeant in charge of the camp) around the camp at the time he was there [R. 1673]; he could not seem to place his face [R. 1673]. He recalled Akamatsu (another Sgt. in charge of the camp); he might have seen him around the camp once or twice within the time he was on sick call [R. 1673]. He did not remember the Japanese Officer in charge of the detail [R. 1677]. In November 1945, he made a statement on his return to the United States regarding what happened to him in the camp [R. 1649]. In that statement he did not mention Kawakita [R. 1649, 1650]. Although he was shown the statement two weeks before he testified, he could not recall what was in it [R. 1652]. [Exhibit AG in evidence—Statement made November 16, 1945—R. 1654]. He said he made the statement in November 1945. He was shown a number of the pictures of the Japanese personnel and could not identify them [R. 1658, 1659, Exhibits B, C, D, E, F, and G and H, R. 1660, 1661].

Frank E. Mino, who had been under shock treatment and had been under the care of psychiatrists for mental illness [R. 817], growing out of the war, was permitted to testify, over objections, regarding the alleged occurrences, and his testimony was not stricken; nor was the jury given

any instructions as to how to consider the testimony of insane persons [Refused Instruction No. 159, Clk. Tr. p. 277]. He testified that approximately May 15, 1945, he saw the defendant have a conversation with Toland and in a few minutes kick him. On cross-examination [Rep. Tr. p. 845] he testified there might have been a Japanese guard with Toland's detail but he did not hear what was said between the defendant and Toland. That he did not go over to assist Toland nor did he report the incident, and that Spurlock picked Toland up. He said nothing about Kawakita in his statement to the army on August 15, 1945 [Defendants Exhibits AD] although he told the fantastic tale about:

“One day while working in the steel mills men were talking to a Japanese guard. They blamed it on me for their talking and clubbed me on the top of my head, causing a gash in my head about three inches wide and about two inches deep. Our medical doctor, Captain Blick, worked on me, giving me treatments for my head.”

He said:

“Many men were killed at the factory, made to be accidents but weren't and every time a man was killed Captain Mongo, in charge of the camp, would tell the men it was their own fault, accidents, but I saw Japanese push men in hot blazing steel.”

FRANK E. MINO testified [Rep. Tr. 791 *et seq.*] “approximately May 15, 1945” he saw the defendant have a conversation with Toland and in a few minutes kick him. On cross-examination [Rep. Tr. 845] he testified that there might have been a Japanese guard with Toland's detail; that he did not hear what was said between the defendant and Toland; that he did not go over to assist

Toland nor did he report the incident. Spurlock picked Toland up.

NATHAN SUTTON testified [Rep. Tr. 728 *et seq.*] that “around May” of 1945 “couldn’t truthfully state ‘time of day’ ” he saw the defendant talking to Toland and kick Toland as he stooped to pick up a rock. He marked a different place on the map, Exhibit 24a, where it allegedly occurred.

GID H. SPURLOCK testified [Rep. Tr. 1082 *et seq.*] that “About around the spring” of 1945 “around in May” he was working with Toland cleaning rocks off the railroad tracks when the defendant “come by and kicked and pushed him down on his face”; that he started over to pick Toland up and defendant told him to leave Toland alone.

ALEXANDER HOLIK testified [Rep. Tr. 1402 *et seq.*] that “around May 1945” he was working with Toland cleaning rocks off the tracks; that he saw the defendant “mumbling to Toland” and “the first thing I knew he kicked him and pushed him over on his face.” On cross-examination [Rep. Tr. 1418 *et seq.*] he admitted that he did not see what began the incident; that he did not hear what was said.

THE DEFENDANT testified [Rep. Tr. 4106] that he did not kick, hit or shove Toland. That in May 1945 he was doing clerical work in the warehouse office at the *factory*. A copy of his worksheet showing his clerical work was introduced as an exhibit. [Ex. DK; R. 3802.]

DR. LE MOYNE BLEICH testified he examined the men each day to determine if they were fit for work. [Rep. Tr. 3352 *et seq.*] Dr. Bleich further testified that he did not let men go out who were not fit for work and that

Toland was on rest over several periods of time. He testified that from April 21 until August, that Toland was on light work duty in the garden, according to his card records.

OVERT ACT (b).

J. C. GRANT (Overt Act B).*

J. C. GRANT testified [Rep. Tr. 1915] that on a date he couldn't tell, but in the month—it must have been about the latter part of April or the first part of May—in Camp Oeyama about four or five-thirty in the afternoon [Rep. Tr. 1915, 1916], while he was resting, he went to the Red Cross storeroom where they had Red Cross supplies and ate his fill and got some cigarettes and chocolate bars and came outside and dropped a package of cigarettes, and one of the sentry noted that he dropped something and asked him what it was. Grant told him and the sentry called Akamatsu, the Sergeant who was on duty at the Camp that day. [Rep. Tr. 1916.] After the sentry called Akamatsu he come running out roaring like a lion with his wooden saber, slapped him around and beat him up and then Ichiba Goonso also came running out then. [Rep. Tr.

*This overt act was a summary punishment of Grant imposed by the Japanese Sergeants, Ichiba and Akamatsu, at the camp for Grant's stealing and breaking into and getting scarce rationed food.

There was no specific date or time; it is uncontradicted from the records and the testimony of the defendant as well as others that Kawakita was working as a clerk in the factory and the quitting time at that work was five p. m. All of the witnesses placed the occurrence around four o'clock on an uncertain day.

This is not either the kind of act nor the type of thing that is "treason" nor the kind of testimony that would support the Constitutional mandate of two witnesses to the same overt act with specificity.

1927.] It was one of the sergeants that was there—Ichiba or Akamatsu—that ordered him over by the cesspool; he was knocked into the cesspool by Akamatsu, and was ordered out of the cesspool by Akamatsu; then Ichiba Goodso had a stick of wood and was fixing to knock him back into the cesspool with a piece of wood and he ducked that and Akamatsu knocked him back again with his fist. [Rep. Tr. 1917-1918.] He was repeatedly knocked in again by Akamatsu every time he was ordered out and he was dazed. Just about that time the working party came in at the time that Akamatsu and Itchiba were working on him. [Rep. Tr. 1918.] He didn't see what the defendant did after he came in. [Rep. Tr. 1918.] He remembers that Itchiba and Akamatsu were giving him the works for the burglary and breaking into the storehouse, but he couldn't tell anyone's name that was around. He remembers seeing several others around the pool besides the Japanese. Captain Bleich, the camp doctor, was trying to pull him out and he had severe cramps. [Rep. Tr. 1920.] He was finally ordered out by Itchiba and carried back to the camp office. [Rep. Tr. 1921.]

On cross-examination, Grant admitted that the occurrence took place about 3:30 or 4:00 o'clock in the afternoon. [Rep. Tr. 1927, 1928.]

DAVID R. CARRIER testified [Rep. Tr. 366 *et seq.*] that in May 1945 around 4 o'clock in the afternoon he heard a commotion outside and went to the door where he saw Ichiba, Akamatsu, 2 or 3 others and the defendant talking to Grant. That he saw the defendant strike Grant twice after which Ichiba and Akamatsu shoved Grant into the cesspool. A Japanese guard then ordered him back inside. He could not hear what was said and did not know

what had caused the commotion but did know it was a serious offense to steal any food.

WILLIAM GAGE, JR. testified [Rep. Tr. 886 *et seq.*] that the middle of May, 1945 when he returned from the factory at between 4:30 and 5:00 in the afternoon his detail was lined up facing the cesspool; were told an American had been caught stealing American Red Cross chow out of the storehouse and was being punished. He then left the detail to see the doctor and later in the afternoon again saw Grant at which time he was in the pool and Akamatsu, Ichiba and Kawakita had long bamboo poles and were whacking Grant over the head with them. The defendant and other Japanese were talking and laughing. On cross examination the witness testified [Rep. Tr. 943] that there were regulations against stealing and in addition the Americans were under strict orders not to eat anything raw for their own health's sake. He saw Ichiba, defendant, Akamatsu and several other Japanese guards strike Grant. Dr. Bleich was there "taking it all in when I walked up there."

MORTON FEINBERG, testified [Rep. Tr. 965 *et seq.*] that "sometime in April of 1945." "The approximate time was three or four in the afternoon" he heard a commotion in the center of camp and went out there where he saw "Grant standing at attention there, and Akamatsu was out there, Ichiba, Kawakita, Harvey who was an Englishman, and Tugby who was a Canadian, and they were screaming at him in Japanese." "And the next thing I knew they were punching him. Akamatsu punched him. Ichiba punched him. Harvey and Tugby and Kawakita punched him. Then they started to knock him into the pool." He did not know if the Japanese was interpreted or not. [Rep.

Tr. 1044.] Grant was knocked into the pool five or six times by Akamatsu and Ichiba. [Rep. Tr. 1047.] Grant told the witness he was being punished for stealing American cigarettes and chocolate bars. [Rep. Tr. 1049.]

GID H. SPURLOCK, testified [Rep. Tr. 1084 *et seq.*] that “around in April” of 1945 he marched into camp from the factory and lined up with the rest of the detail facing the pool where Grant was standing with some Japs, not the defendant who had come in with them. [Rep. Tr. 1086.] One of the Japs, not the defendant, pushed Grant into the pool. He saw the defendant hit Grant over the head with his saber. On cross examination he testified [Rep. Tr. 1130] that he did not hear any of the conversation; that he could not remember who was present.

GEORGE V. MAYO, testified [Rep. Tr. 1161] that “Some-time in April or May of 1945” he heard a commotion outside and stepped out and saw Grant in the cesspool and saw the defendant and two or three other Japanese standing around the pool and saw the defendant strike Grant. He found out that Grant was being punished for stealing.

ALEXANDER R. HOLIK testified [Rep. Tr. 1404] around April, 1945 between five and six in the evening he heard “yap-yap” outside and went out and saw a bunch of Japanese working over Grant dragging him over to the cesspool; the defendant was not present then but later he saw the defendant shove Grant into the pool and swing his saber at him a couple of times. He couldn’t name anyone else who was there. [Rep. Tr. 1446.]

JAMES T. PHILLIPS testified [Rep. Tr. 1510] that some-time in May or June, 1945 about 4:30 or 5:00 in the evening he heard a commotion and saw a Jap take Grant around by the pool and saw Akamatsu and Ichiba and

three or four more Japs come running down to the pool where Akamatsu and Ichiba hit Grant knocking him into the pool. He then saw Harvey, Tugby, Dean, the defendant and some others come over and saw the defendant strike Grant and push him into the pool. He heard the defendant ask Grant why he had broken into the store-room. On cross examination he testified [Rep. Tr. 1543] that they had been told there would be serious punishment for anybody who stole food. Dr. Bleich was there but did not say anything that he heard.

PHILIP D. TOLAND testified [Rep. Tr. 1645] that "Around the month of May" 1945 he saw the defendant push Grant's head into the water with a long wooden stick. He did not remember who else was present.

Toland could not recall whether he saw Sgt. Ichiba in the camp during the time he was there [Rep. Tr. 1673]; he couldn't seem to place his face. He did not recall Akamatsu, or seeing Akamatsu around the camp. [Rep. Tr. 1673.] He might have seen him once or twice; he did not recall an Englishman named Harvey or another Englishman named Tugby, or a Warrant Officer named Dean, or Chief American Petty Officer named McElheny around the pool at the time Grant was there. [Rep. Tr. 1674.] He heard Harvey's voice at the time Grant was at the pool; he did not see Dr. Bleich around. [Rep. Tr. 1674.] He saw slapping by Japanese Americans as punishment. [Rep. Tr. 1675.]

DAVID D. HUDDLE testified [Rep. Tr. 1718] that "This particular instance happened in April 1945" around 4:30 or 5:00 in the afternoon when he saw the defendant hit Grant over the head with a wooden sword. He could not remember who else was present [Rep. Tr. 1744] but later

when he returned he saw Ichiba, Akamatsu and others there. [Rep. Tr. 1747 *et seq.*]

JOHN L. MCCOY testified [Rep. Tr. 1780] that "at between 4:00 and 6:00 o'clock, I would say, in the months of April or May" 1945 he saw Grant standing by the pool with the defendant, Ichiba, Harvey and a couple of other Japanese standing on the side of the pool. The defendant hit Grant on the head with a wooden sword. Grant told the witness he was being punished for stealing from the Red Cross storehouse. [Rep. Tr. 1810.] He did not report the incident to the military authorities. [Rep. Tr. 1811.]

JAMES A. CAIRE testified [Rep. Tr. 1984] that the latter part of May, 1945 after 4:00 o'clock he heard commotion and looked out and saw Grant by cesspool with 2 or 3 Japanese and defendant came up to group and started talking to Grant and then hit him, knocking him into the pool, and then keeping him there with his wooden sword. Akamatsu and Ichiba was in the group.

WOODROW T. SHAFFER testified [Rep. Tr. 2049] that in the latter part of April, 1945 about 4:30 he saw a commotion over by the pool and saw Grant, Ichiba, Akamatsu, the defendant, Tugby, Harvey and several Japanese there. Ichiba struck Grant knocking him into the pool. The defendant told Grant to submerge and the defendant and Ichiba struck Grant with sticks when he refused to submerge.

DR. LEMOYNE C. BLEICH testified [Rep. Tr. 3380] that he saw a part of the Grant incident. Grant asked him to do something about it and the witness told him all that he could do was to keep moving in the water. The witness

was not allowed to stay long as Ichiba made him get away. He remembered Harvey was there also but could not remember the names of any others. He knew Grant was being punished for stealing.

THE DEFENDANT testified [Rep. Tr. 4107] that he did not direct or participate in the punishment of Grant; that he did not strike, beat or hit him. In April of 1945 he was working as a clerk at the factory. The work hours were from 7:30 to 5 p. m. and by the time he left it was 5:10 p. m. or later. He only went down to the camp once or twice a month [Rep. Tr. 4102] during the period from March 1 to August 15th, 1945.

SACHIO OGUNI testified by deposition, that Interpreter Kawakita Fujiawa was present, and that was not there. [Ex. AV in evidence.]

OVERT ACT (c).* (Destruction of Blankets.)

NATHAN SUTTON testified [Rep. Tr. 731] that in December 1944 some men came through the han calling cer-

*It will be noted that the foregoing overt act, according to the different witnesses, occurred at the camp at an indefinite date in December, 1943, "sometime before Christmas," "sometime after Christmas," "sometime around the middle of December," etc.

It will also be noted that at that time Kawakita was an interpreter at the mine and that the mine trains, according to all the testimony, and the testimony of Carter who complained in overt act (i) that he was not moved because the trains did not leave the mine until five o'clock. Hence, it was physically impossible under all of the evidence for Kawakita to have been at the camp where the beatings took place for cutting up blankets and at the mine—an hour's distance by train—at the time.

It will also be noted that all of the testimony was uncertain as to dates, times, places and personnel.

Furthermore, it was a form of punishing each other for a serious violation of the government laws of Japan, to-wit, cutting up blankets, which were scarce.

tain names, his included. They were taken outside and told to stand in two files. There were about 30 men lined up. They were told they had misused Japanese Government property. The defendant was present. An Englishman went down the line slapping each one. Then Harvey went down the line socking them. Finally the defendant went down the line but did not go far. [Rep. Tr. 735.] Then the men in the front rank were told to face the men in the rear rank. They were then told to punch each other which they did. [Rep. Tr. 738.] The Japanese guards moved around and if they were not hitting each other hard enough they were socked on the head with a stick or gun barrel. The defendant also struck some of the men. Some of the men acknowledged that they had cut up blankets. [Rep. Tr. 748.] Ichiba and Japanese Military officers were present. Specific instructions had been given not to cut up blankets. [Rep. Tr. 753.] The prisoners of war had cut up the blankets to make scarves, socks etc. [Rep. Tr. 754.] No other punishment was given for cutting up the blankets. [Rep. Tr. 762.]

GID H. SPURLOCK testified [Rep. Tr. 1091] that in December 1944 about 20 men were made to face each other and beat each other. The defendant, Tugby, Fujisawa and Gammy were present. He saw the defendant hit three or four men. He did not know who gave the orders to strike each other. He saw the Japanese military guards moving about. No other punishment was given for cutting up the blankets. [Rep. Tr. 1141.]

MAURY RICH testified [Rep. Tr. 1337] that sometime between December and March a few of the Americans were cutting up blankets for leggings and mittens. The Japanese found the cut up blankets. 26 or 30 men were

made to line up in two ranks and punch each other. The defendants struck several of the men. He did not know who gave the orders. [Rep. Tr. 1390.]

JAMES T. PHILLIPS testified [Rep. Tr. 1519] that after Christmas of 1944 he heard a commotion outside and went out where he saw 20 or 25 or 30 men lined up facing each other. Akamatsu, Ichiba and six or seven other Japanese, including the defendant, were running up and down the line making the Americans strike each other and if they did not hit hard enough the Japanese would haul off and hit them. Harvey (British), Tugby (Canadian) and McElhaney (American) were also taking part. He did not hear of any other punishment for cutting up blankets. [Rep. Tr. 1589.]

JOHNIE T. CARTER testified [Rep. Tr. 1838] that the defendant hit him across the back and head because he was not hitting the man in front of him hard enough. On cross-examination [Rep. Tr. 1865] he testified that he saw very few beatings and that American prisoners of war were beaten "Only in case that they brought it upon themselves." He had done the sewing on the blankets after they were cut up.

WOODROW T. SHAFFER *testified* [Rep. Tr. 2052] that around the middle of December 1944 his number was called to form in front of the Japanese office "there was 29 other men" besides himself. They were lined up in two ranks of 15 men facing the office. They were told they were to be punished for destroying Japanese Government property. [Rep. Tr. 2054.] Tugby, Harvey, the defend-

ant, and Japanese guards were present. The defendant told the British quartermaster to go down the line striking each man. The defendant about faced the front rank and told the men to pair off and strike and fight with one another. The defendant, Tugby and the Japanese guards struck several of the men.

ROBERT WILLIAM GAYLER testified [Rep. Tr. 2340] that shortly before or after Christmas, 1944, the defendant, Ichiba, the Japanese quartermaster sergeant and one or two others, being present, 26 or 30 prisoners of war were lined up in single rank while the defendant talked to them about the blankets. Then the defendant had them line up in two ranks facing each other and told the British quartermatser sergeant to go down the line hitting each one and then told the men to start slapping each other. The defendant also told them they were not hitting hard enough and to use their fists. He had seen other Japanese military personnel strike other military personnel. [Rep. Tr. 2383.]

WILBURN VAN BUSKIRK testified [Rep. Tr. 2540] that before Christmas, sometime in December, 1944, blankets were found which were cut up into socks and mittens. Between 20 and 30 men were lined up in front of the barracks. Tugby, Akamatsu, Ichiba, the defendant and a couple of other guards were present. An Englishman was told to go down and slap everybody which he did. The defendant told him to do it. The defendant hit a man and knocked him down. The men were then struck by Ichiba, Akamatsu and several of the guards. Then the

defendant told the men to about face and to slap each other which they did. On cross examination the defendant testified that he had cut up blankets but was not caught. [Rep. Tr. 2661.] That he knew it was against the regulations.

DR. LEMOYNE BLEICH testified [Rep. Tr. 3384] that he saw a group of 12 to 20 or 25 men lined up on the parade ground facing each other and made to slap each other. They were being punished for cutting up blankets. He did not remember who the Japanese personnel were who were present.

MEILI FUJISAWA *testified* [Rep. Tr. 3641] that he saw the incident of men beating each other up or striking each other. He thought it was in 1943. He was not sure if the Americans were there or not. He had a discussion with Ichiba regarding punishment for cutting up blankets. It might have been 1944 because Ichiba was there and he may have come the first or middle part of 1944. [Rep. Tr. 3649.] He could not remember who was present except for British NCA Yerling. He did not see the defendant there. [Rep. Tr. 3650.] Ichiba said that any person destroying government property would be severely punished and they will punish each other.

THE DEFENDANT testified [Rep. Tr. 4107] that he had nothing to do with the punishment of the men for cutting up blankets. In December 1944 he was working at the mine, which was an hour away by train, and was not at the camp.

OVERT ACT (d).* (Thomas J. O'Connor.)

THOMAS JOHN O'CONNOR testified [Rep. Tr. 2100] that "around the end of June or middle—beginning of August or July, end of June or beginning of July, around that time" of 1945 Rael, Floyd and he broke into the warehouse. Around 1:00 o'clock the same day the Japanese took an inventory and found the stuff missing. Rael and Floyd were caught "right off the bat." Akamatsu, the defendant, Ichiba and a crippled Japanese soldier were striking Floyd and Rael. After about 10 minutes they divulged my name and I was taken out in front of the cesspool where Ichiba hit me. Akamatsu hit him and knocked him into the pool. The defendant struck him the third time. [Rep. Tr. 2105 & 6.] After that they just took turns. On cross-examination he testified that in the statement given to the Navy he only mentioned Ichiba and Akamatsu and not the defendant.

ALBERT M. ENNIS testified [Rep. Tr. 595] that the last part of July, 1945, around 2:30 in the afternoon, he heard

*It will be noted that this also was a summary punishment of O'Connor for burglary and stealing. Meiji Fujisawa testified that he was acting as interpreter at the camp at the time and questioned Rael, who admitted taking things from the storehouse. He did not see the defendant there. [R. 3641.] The defendant testified that he was working at the factory as a clerk at the time and was not at the camp.

Comparing the time of the occurrences and the summary nature of the punishment, this was not "treason." It may be noted that several witnesses testified that the Japanese punished their own people summarily by slapping. [Toland, R. 1675; Grant, R. 1925.]

It will be noted that the time of this occurrence varies from right around noon to three or four o'clock and that the date was all different by different witnesses. There were no two witnesses to the identical date, the identical place, the identical occurrence.

a commotion in the street and went out to see what was going on. He found O'Connor, Rael and Floyd lined up beside the cesspool. The defendants, Ichiba, Tugby and Harvey were there. Ichiba struck each of the three men. Defendant struck each of the three men knocking O'Connor into the cesspool. He did not hear any conversation at the pool.

PAUL L. SARNO testified [Rep. Tr. 658] that about the last week in July, about 1:00 or 1:30 he heard a big commotion outside and went out. He saw Floyd and Rael standing there with Ichiba and Akamatsu hollering and striking them and knocking them into the pool. He then saw Tugby and Harvey and defendant approaching. When they got to the pool he saw their lips moving but could not hear what was said. Akamatsu, Ichiba, the defendant, Tugby and Harvey were striking O'Connor, knocking him into the pool. He did not say anything in his statement to the authorities about the defendant. [Rep. Tr. 688.]

MORTON FEINBERG testified [Rep. Tr. 968] that about July 21st between 3:00 and 4:00 in the afternoon Harvey and Tugby were going around trying to locate some Red Cross supplies which had been stolen. They found Rael and Floyd and took them out to the cess pool. Akamatsu, Ichiba, the defendant and some guards were present. After beating Rael and Floyd for about 20 minutes they found out about O'Connor and got him. They beat the three of them up and threw them in the pool. Akamatsu had a shoe and was beating him with it and the defendant hit him a few times. On cross-examination he testified that there were strict orders about not breaking into the Red Cross storehouse. [Rep. Tr. 1052.] Every one understood they would be severely punished if they did. He did not

make any reports to the American military authorities when they took over the camp. [Rep. Tr. 1061.]

JAMES T. PHILLIPS testified [Rep. Tr. 1524] that sometime in August, 1945, "right at noon" the bell rang for the men to fall out. They all lined up and Akamatsu through an interpreter (not the defendant) stated that someone had broken into the storeroom and got some chow out and they were to stay there until the barracks were searched. They found a bag with Rael's name on it full of corned beef,, cigarettes and chocolate bars. They beat Rael up until he told who else was involved. After they had Rael, Floyd and O'Connor lined up the defendant came into the camp. He saw the defendant hit O'Connor about three times and knock him into the cesspool. On cross-examination the witness testified that they had all been warned that there would be serious punishment for anyone who stole food. [Rep. Tr. 1543-5.] He did not mention the defendant in any statements he made to the Army. [Rep. Tr. 1557, 1573.]

HARDY M. WOOLDRIDGE testified [Rep. Tr. 2437] that the last part of July or first of August, 1945, a little after noon, the camp were ordered to fall out. Harvey, Tugby, Ichiba, Akamatsu and the defendant were down by the cesspool with Floyd and Rael. He saw them striking Rael and Floyd knocking them into the pool. Floyd and Rael were dismissed and O'Connor was called out of ranks. He was struck by the same men and knocked into the pool. Akamatsu struck him with a shoe heel. Somebody down by the pool said some Red Cross supplies had been stolen.

WILBURN VAN BUSKIRK testified [Rep. Tr. 2546] that the first part of July, 1945, just after the noon meal, he

saw Rael and Floyd down by the cesspool with Ichiba, Akamatsu, the defendant, McElheny, Harvey and Tugby and a couple of others. He saw these people strike Rael and Floyd, Akamatsu striking Floyd with his shoe. O'Connor was called out and Floyd and Rael were dismissed. He saw Ichiba, Akamatsu and the defendant strike O'Connor several times knocking him into the pool. On cross-examination [Rep. Tr. 2693] he testified that the defendant asked O'Connor if he had stolen anything from the warehouse and he said that he did.

DR. LEMOYNE C. BLEICH testified [Rep. Tr. 3388] that he did not witness anything that happened to Floyd and O'Connor.

MEIJI FUJISAWA testified [Rep. Tr. 3638] that in the summertime, he did not remember what year, he saw O'Connor get hit and knocked in the pond. He was acting as interpreter questioning Rael who admitted taking things from the storehouse. Ichiba and Akamatsu ordered Harvey and Tugby to make further investigation and O'Connor was brought out. He was hit by Ichiba and Akamatsu after which Ichiba ordered Harvey to carry on and O'Connor was shoved into the water at least a half dozen times by Harvey. He did not see the defendant there. [Rep. Tr. 3641.]

THE DEFENDANT testified [Rep. Tr. 4107] that he did not impose punishment on O'Connor or knock him into the pool. He was working at the factory as a clerk, and was not at the camp at the time.

OVERT ACT (g').* (David R. Carrier and George W. Simpson.)

DAVID R. CARRIER testified [Rep. Tr. 369] that he was in Montgomery's work detail the latter part of July, 1945. When they came in early the Japanese sergeant made them run around the compound. The defendant shouted at him to "hurry up" and "catch up." He testified he didn't catch up and "I made about four extra laps after the men quit." He could not identify the Japanese officer. [Rep. Tr. 400.] On cross-examination he testified that there was a Japanese standing near the defendant when he shouted at him.

GEORGE W. SIMPSON testified [Rep. Tr. 2246] that sometime in July, 1945, he was in Montgomery's detail which came into camp early. Ichiba told them they had come in early and to double time around the quadrangle. They had made about two laps when the defendant walked out. The defendant told him to catch up with the rest of the men and threw some clods.

*The time, place and date of this occurrence varies from May to July and the testimony is that the men all came in from work early. It must again be remembered that Kawakita, according to the records in evidence, as well as all the other testimony, was at that time working as a clerk in the factory—the quitting time being five o'clock at the factory. Hence, he did not and could not have come in early.

This overt act, likewise, should not arise to the dignity of "treason." It has for a long time been recognized as simple punishment in military circles for a violation of a slight infraction of the rules. The evidence as to this overt act is likewise very uncertain and indefinite. No two witnesses fixed the occurrence at the same specific day, as of the same specific time. Some fixed the occurrence with the intent to injure the United States—to strengthen Japan in the war or weaken the United States in the war. The order of the punishment was by Ichiba, the military officer. Ichiba sometimes played pranks on the men.

RALPH W. MONTGOMERY testified [Rep. Tr. 175] that he was in charge of a work detail of 20 men. At the beginning of the afternoon session a work quota was set which was completed a half hour before usual quitting time. Ichiba was angry because the detail came in early and ordered the men to double-time around the compound. While the men were running the defendant arrived at the scene. Simpson and Carrier were not able to keep up with the rest of the men. The defendant shouted to them to keep up with the rest of the men.

JOHN J. ARMELLINO testified [Rep. Tr. 1214] that the last end of May or early part of June, 1945, when he came in from the factory he saw Carrier and Simpson running around the quadrangle. The defendant yelled at Simpson, who was behind Carrier, and threw either rocks or clods of earth at him. Ichiba and Akamatsu were also there.

MAURY RICH testified [Rep. Tr. 1342] that in July he was in Montgomery's detail. They came in early and Ichiba made them run around the compound. While they were running the defendant came in with another detail. He came over and told the men to run faster and threw pebbles or rocks at Carrier and Simpson. The rest of the men were dismissed but Carrier and Simpson kept on running. He did not know who gave the order to stop running.

HOWARD L. POPE testified [Rep. Tr. 1476] that in early summer or late spring, probably July, 1945, when he returned from the factory detail and came into camp he saw a group of men running around the quadrangle. He went to his barracks and a few minutes later saw Simpson and Carrier still running and the defendant was standing

at a corner of the building tossing rocks at them. He did not know who stopped them from running.

JAMES T. PHILLIPS testified [Rep. Tr. 1532] that in June, July or August, 1945, close to 3:30 in the afternoon, he looked out the door of the barracks and saw 15 or 20 men running around the quadrangle. He walked up to the front of the camp and saw the defendant pick up two rocks and throw at Carrier and Simpson and holler for them to run faster.

JOHNIE E. CARTER testified [Rep. Tr. 1843] that sometime around July, 1945, at around 4:30 in the afternoon he saw a group of men running around the quadrangle. He heard the defendant tell Carrier and Simpson to run faster; that they had 3 or 4 more laps to make and "he picked up a few gravel or rock and threw it at Carrier and Simpson."

ROBERT WILLIAM GAYLER testified [Rep. Tr. 2344] that about two months before liberation, between 3:00 and 5:00 in the evening, he saw a detail come in the gates and have a conversation with a Japanese, not the defendant who was not there [Rep. Tr. 2349], after which the men began running around the compound. The defendant came in after the men were running around the compound and said that Carrier and Simpson were not running fast enough and made them run an additional five or six laps.

HARDY M. WOOLDRIDGE testified [Rep. Tr. 2444] that around the latter part of July, 1945, he was in Montgomery's detail and came into camp early. Akamatsu told them they had come in too early and to double time around the compound. After eight or ten times around the compound Akamatsu excused all of the men but Carrier and

Simpson. After he had stopped running he saw the defendant throw a rock or clod or something at Simpson and heard him tell Simpson to hurry up, go a little faster. On cross-examination he testified [Rep. Tr. 2514] that he had seen the same kind of punishment meted out from 15 to 30 times, "just practically once or twice a week."

THE DEFENDANT testified [Rep. Tr. 4110] that he did not come in early with a working party in July or August, 1945. He had nothing to do with compelling Carrier and Simpson to run around the compound. He was working at the factory as a clerk, his quitting time being 5 o'clock in the afternoon, and it being about ten minutes thereafter for him to leave. He at that time was living at the home of Kyoshi Movi and had to catch a special train to get there. [R. 3782.]

OVERT ACT (i).* (Johnie T. Carter.)

JOHNIE T. CARTER testified [Rep. Tr. 1847] that the defendant took some men out to get some logs. He was

*As there were strict orders to keep the men physically fit for work, and the principal objective of the Japanese was to keep the prisoners working, it is very unlikely that Kawakita would have denied any medical attention to the prisoners. Kyoshi Movi testified [R. 3792] that he carried a prisoner of war on his back to the mine hospital, which was a short distance away, and that it was necessary to maintain a hospital at that point. Furthermore, there were two American orderlies, prisoners of war, who were medical aids men and came there and got Carter.

It is regarded as bad medical technique to move a person who has been injured in a fall, unless it is done by someone experienced in handling injured persons. There are no two witnesses who place the time—varying from November to December. Furthermore, there is no evidence that this event, if it occurred, was done for the purpose of aiding Japan to win the war or the United States to lose the war. On the contrary, it would have the opposite effect, if the working man was disabled and could not be required to return earlier. This charge as a charge of "treason" seems to be stretching treason to unusual limits.

carrying a log, it was raining and sleeting and he felt a push and fell and landed on a rail. Then he remembered nothing until he was in the mess hall. He heard Gage ask the defendant for permission to take him into camp and the refusal.

PAUL L. SARNO testified [Rep. Tr. 660] that the first week in December, 1944, he was working at the mines as a medical orderly. He received a report that someone was hurt downstairs. He went down and found Sgt. Gage with Carter. They both thought it was a back injury and put him on a litter and carried him into the mess hall. This was about 2:00 in the afternoon. Sgt. Gage asked the defendant if Carter could be taken back into camp and was answered "no." Sgt. Gage then asked if he could be taken to the Japanese clinic for X-rays which was also refused. Carter was taken into camp with the rest of the detail and had to ride in an open car on the train which did not arrive at the camp until about 6:00 o'clock.

WILLIAM GAGE, JR., testified [Rep. Tr. 901] that about the last week in November, 1944, about 1:30 in the afternoon he received a call that a man was injured. He was a medical aidman and went down and found Carter. He examined Carter and placed him on a litter and took him into the mess hall. The defendant was there and witness asked him if he could take Carter into camp for medical attention which was denied. He then asked the defendant for permission to take Carter to the Japanese clinic for X-rays which was also refused. On cross-examination the witness stated that he did not report the injury to the Japanese foreman or military personnel. [Rep. Tr. 921.]

THE DEFENDANT testified [Rep. Tr. 4111] that he did not see Carter slip or fall or receive an injury. If he had known he was injured he would have taken him to the mine hospital; he would have asked permission from the foreman to take the man to the hospital. He did not delay his removal from the mine to the camp. He had taken prisoners of war to the mine hospital. [Rep. Tr. 4080.] On one occasion in November his attention was called to an injured man and after getting permission from Mr. Tamura he carried the man to the hospital on his back.

OVERT ACT (j).* (Armellino Paint Bucket Act.)

JOHN J. ARMELLINO testified [Rep. Tr. 1218] that he was in the can carrying detail, carrying one can. The defendant stopped him and asked him why he wasn't carrying two cans. Armellino replied that he was too weak whereupon the defendant told him he would carry two cans and like it. He then took a can from another man and placed it in the witness' arms and struck him. On cross-examination [Rep. Tr. 1234] the witness testified that he did not carry the cans much longer; that the defendant placed him on another detail.

ALBERT M. ENNIS testified [Rep. Tr. 594] that the last part of May, 1945, he was carrying paint or white lead and that the defendant stopped one of the group,

*How the Government can dignify this overt act as an overt act of treason we are having difficulty to find. This is comparable to making "spitting in a man's face" treason, as discussed in *Stephan v. United States*. No other witness corroborated Armellino and the time, place and date is likewise uncertain and indefinite. In the words of Patrick Henry:

"If this is Treason, make the most of it."

Armellino, and asked him why he wasn't carrying two buckets like the rest of the men. Armellino told him he was too weak and unable to carry two. The defendant stopped the next man and took one of his buckets and gave it to Armellino and told him to carry it too; then stood back and hit Armellino; and pushed him along with the two buckets.

THE DEFENDANT testified [Rep. Tr. 4112] that he did not order Armellino to carry two buckets instead of one. At that time he was working in the factory office as a clerk. The interpreter at the factory was a man named Inouye.

OVERT ACT (k).* (Woodrow T. Shaffer.)

WOODROW T. SHAFFER testified [Rep. Tr. 2057] that in the early part of August, 1945, about four o'clock in the

*This overt act was also an overt act of punishment. The times and dates were likewise uncertain and indefinite. The time also was at a time when the defendant was working as a clerk in the storehouse, from 7:30 in the morning until 5:00 o'clock in the afternoon.

The dates are uncertain as follows:

Shaffer said it was the early part of August, 1945, about 4:00 o'clock in the afternoon;

Rael said it was the summer of 1945;

Maury Rich, July, 1945;

Phillips, after May and before the end of the war, about 4:30 or 5 o'clock;

Another one, June, 1945;

Oldridge in July or first part of August, 1945, and

Van Buskirk the last part of July or first part of August, between 4:00 and 6:00 o'clock.

It must be remembered that these men were staying at the Hotel Northern in the City of Los Angeles and testified they had talked things over.

The act of punishment was within the internal affairs of Japan and certainly did not make Japan stronger in winning the war, or the United States weaker.

afternoon a Japanese guard caught a man cooking some beans that had not been issued in the general mess. Tugby and American Chief Petty Officer McElhaney got him and took him to the Japanese front office. The defendant, Ichiba, Akamatsu and several Japanese guards were there. Shaffer admitted stealing the beans. The defendant told him to get up on the little stand. The defendant and Akamatsu placed one piece of bamboo under his knees and another under the high part of his instep and made him kneel on them. Another piece was placed behind his knees and he was made to squat on them. The defendant placed a bucket of water in his hands and told him to hold that above his head without bending his elbows. Shaffer's elbows started to bend and the defendant and Akamatsu struck him with sticks. The defendant and the Japanese guards kept the bucket filled. A detail from the factory came in and after they were dismissed the Japanese guard brought a log over and the defendant told him to hold that up that he couldn't spill that. He fell off the platform and something hit him on the back of the head.

GID H. SPURLOCK testified [Rep. Tr. 1096] that around May, 1945, when he came into camp from working at the factory he saw Shaffer upon a platform squatting with a bamboo stick beneath his legs holding a bucket of water over his head. When some water spilled he saw the defendant and other Japanese fill the bucket. He didn't know why Shaffer was up there. [Rep. Tr. 1144.]

GEORGE W. MAYO testified [Rep. Tr. 1162] that in the summer of 1945 he saw Shaffer on a platform kneeling with bamboo under and behind his knees with a bucket of water over his head. He saw the defendant poke Shaffer in the chest once or twice and strike him with his cane.

MAURY RICH testified [Rep. Tr. 1346] that in July, 1945, when he came in from working at the factory he saw Shaffer on the high stand kneeling on a piece of lumber with a bucket of water over his head. After the men were dismissed the defendant and another Japanese sentry went over to Shaffer and every time he lowered the bucket of water they hit him over the back with some timber. He did not know why Shaffer was on the platform. [Rep. Tr. 1394.] The defendant came in with the detail. [Rep. Tr. 1346.]

JAMES T. PHILLIPS testified [Rep. Tr. 1535] that sometime after May and before the end of the war, 1945, about 4:30 or 5:00 in the evening he saw Shaffer sitting up on the rack with a bamboo pole under his knees and behind his knees under his ankles with a bucket of water over his head. He saw the defendant, Ichiba, Akamatsu, Hasha, Trosta, Harvey, Tugby and McElheny around Shaffer. When water spilled out of the bucket it was refilled by the defendant and Ichiba. He saw the defendant hit Shaffer in the ribs and poke him with his stick. After a time Shaffer dropped the bucket and witness saw the defendant and another Japanese put a log over his head and make him hold that. Right after that Shaffer collapsed and the log fell on top of him. On cross-examination [Rep. Tr. 1542] the witness testified that he knew Shaffer was being punished for stealing beans which was considered a serious infraction of the rules.

DAVID D. HUDDLE testified [Rep. Tr. 1720] that in June, 1945, he saw the defendant, Ichiba, and Akamatsu with Shaffer. They made him climb up on a platform. The defendant placed a bamboo stick on the platform and made Shaffer kneel down on it and then placed another

bamboo stick behind his knees which made him set down on two sticks. The defendant gave Shaffer a bucket of water and made him hold it over his head at arm's length. If Shaffer lowered the bucket the defendant and another Japanese guard would strike Shaffer with their swords and kept the bucket full of water. Later the defendant ordered a piece of timber placed in Shaffer's hands and made him hold that over his head. Then Shaffer fell off the platform head first and the log struck him on the back of the head. After he was fixed up the defendant placed sticks on the ground again and made Shaffer kneel down on them in the same fashion as he had before. They had been warned of severe punishment for stealing. Shaffer was being punished for stealing from the Japanese warehouse. [Rep. Tr. 1752.]

HARDY M. WOOLDRIDGE testified [Rep. Tr. 2459] that in July or first of August, 1945, between five and six in the afternoon, he came into camp with a detail and saw Shaffer kneeling on the ground by the stand. The defendant, Akamatsu and a few more were present. He saw Japanese officers strike their own Japanese personnel. [Rep. Tr. 2469.] He did not mention the defendant in a statement he gave regarding mistreatment. [Rep. Tr. 2478.]

WILBURN VAN BUSKIRK testified [Rep. Tr. 2550] that the last part of July or first part of August, 1945, between 4:00 and 6:00 in the afternoon he saw Shaffer with the defendant, Ichiba and Akamatsu and another guard by the Japanese headquarters. Shaffer was told to get on the stand; the defendant and Akamatsu fixed bamboo poles on the stand; Shaffer kneeled on them and another was placed behind his instep. They took another pole and

placed it between his knees and made him sit back on his heels. Then a Japanese guard brought a bucket of water which the defendant gave to Shaffer and told him to hold it over his head. If his arms bent he was beat over the back and poked in the ribs with sticks by Akamatsu and Kawakita. When the water spilled the bucket was replenished by the defendant. Then a Japanese guard brought a piece of wood which the defendant gave to Shaffer and told him to "Hold that on your head and see if you can spill that." Shaffer fell from the stand and the log struck him on the back of the head. Some time later he saw Shaffer being led back by the defendant. The defendant and Akamatsu placed some bamboo poles on the ground and placed Shaffer in the same position as before. The defendant told him in English to stand on the platform. [Rep. Tr. 2705.] Akamatsu and a guard were there alongside of the defendant.

DR. LEMOYNE C. BLEICH testified [Rep. Tr. 3389] that there were no permanent effects from the treatment Shaffer had received. There was an abrasion or slight laceration on his scalp, which healed in 5 or 6 days.

MEIJI FUJISAWA testified [Rep. Tr. 3675] that he saw the punishment of Shaffer for breaking into the store house. He did not see the defendant there.

THE DEFENDANT testified [Rep. Tr. 4113] that he did not participate in or assist the military personnel in executing punishment upon Shaffer. He was not present when such a thing occurred. At that time he was working at the warehouse office as a clerk, his working hours being from 7:30 to 5 p. m.

P.

Pertinent Testimony of Tomoya Kawakita Regarding
the Overt Acts.

The defendant testified that he lived at the home of Kiyoshi Mori and went in a train to the mine [R. 4101 to 4116]:

“Q. And during this period of time, from November until March, is it now your statement that at no time did you go down to the camp or camp area during that period of time? A. I never went to the camp area between that time.

Q. Now, after you went to work at the factory did you have occasion—what time did you go to work at the factory? What hours did you go to work? A. We went to work—we had to press our time card by 7:10 in the morning and we would finish work and press our time card at 5:10 in the evening.

Q. And during that time were you constantly at the factory grounds? A. Yes, sir.

Q. And in the warehouse where you were assigned as a clerk? A. Yes, sir; I was at the warehouse office and the warehouses.

Q. Sometime during that period of time did you have occasion to go down to the camp after March 1st, 1945? A. Yes, sir; but when I went to the camp—

Q. You have answered my question. And about how frequently would you go to the camp? A. About once or twice a month.

Q. What were the occasions of your going to the camp once or twice a month? A. Before the work was over I would have a call from Lieutenant Hazama and on several occasions from the sergeant who was the ser-

geant for the General Affairs at the camp, to come and help Mr. Fujisawa in doing his translations after the work is done, my work at the factory is done. So, I would—when I leave work I press my time card at 5:10 and I would go back to the dormitory and take a bath, eat, and then by the time I do all that thing it was about seven o'clock when I went to the camp and helped Mr. Fujisawa do some translation work until about nine o'clock that evening.

Q. And you say that would happen once or twice a month? A. Yes; some months maybe once.

Q. In the morning when you arrived at the factory what would be the routine that would happen after your arrival there? A. After we press our time card at about seven-ten, at 7:15 all the employees of the factory assembled on the grounds, in the factory grounds, to report, and each section of the company there would report, and there would be a roll call and we would have a morning ceremony which would last about 30 to 45 minutes.

Q. You say a morning ceremony. Was it something in the nature of a military ceremony? A. Yes, sir.

Q. And who would conduct this ceremony? A. At the factory the branch manager—Mr.—the manager of the factory.

Q. When you went into the camp were you required to salute anybody? A. Yes, sir.

Q. Who were you required to salute? A. We were to salute the guards at the guardhouse, which was situated at the main entrance of the gate to the camp and all the camp officials. There was a strict order from Lieutenant Hazama.

Q. When did you first meet Sergeant Ichiba? A. I met Sergeant Ichiba when I returned from China in Octo-

ber 1944, when I reported on my return to the branch manager and he told me to report to Lieutenant Hazama that I came back from China and I had a conversation with Lieutenant Hazama and he introduced me to Sergeant Ichiba.

Q. And did you afterwards have a conversation with Sergeant Ichiba? A. Yes, sir.

Q. And where was that conversation? A. The conversation was in the jimisha in the camp where the camp administration office was.

Q. What did Sergeant Ichiba say to you and what did you say to him?

Mr. Carter: Just a minute. I object to that upon the ground there is no foundation laid. Let us have the time and the conversation.

Mr. Lavine: I think he testified it was right after he came back from China, right after he reported.

Q. By Mr. Lavine: Do you remember what month it was? A. It was in the latter part of October 1944.

Q. Do you remember the day of the week any closer than that? A. I don't know that. It was the afternoon—it was after the noon meal when I went to the camp.

Q. And who else was present? A. There was one company employee over there in the office, and Akamatsu was there—Sergeant Akamatsu.

Q. And Sergeant Ichiba? A. Yes, sir.

Q. What did Ichiba say to you and what did you say to him? A. Ichiba told me that I must obey all military orders from all military personnel and he told me that the personnel of the camp were veterans in this war and 'If you disobey any orders you might get killed.'

Q. And what did you say in reply to that? A. I told him that I understood what he said.

Q. Thereafter did you see Sergeant Ichiba from time to time in the mine? A. Yes, sir.

Q. How frequently would he come up to the mine? A. He would come about every other week,—every other week. One week Sergeant Ichiba would come and the other week Sergeant Akamatsu would come, and inspect the work area, the mine where the prisoners of war were working.

Q. And did they take a count of the amount of work that was done or do any inquiring about that? A. Yes, sir.

Q. Would Lieutenant Hazama come up at the same time or different times? A. Lieutenant Hazama come up at different times than the sergeants.

Q. Did you at any time ever direct the military personnel in how to run this camp or this man or this work area in the mine? A. No, sir. If I did so, they would kill me.

Q. Did you ever direct any of the workmen as a foreman in the mine? A. No, sir.

Q. Did you ever act as a foreman? A. No, sir.

Q. Did you ever take it upon yourself to act as a foreman in this mine? A. No, sir.

Q. You heard the testimony here of Philip Toland that in the month of June 1945 you kicked him. Did you ever kick Philip Toland at any time at Oeyama? A. No, sir.

Q. Did you ever hit him or shove him or do anything else to make him do more work? A. No, sir.

Q. Did you do anything like that in the month of May, 1945? A. No, sir.

Q. Just what work were you doing during the month of May, 1945? A. I was doing clerical work in the warehouse office at the factory.

Q. And were you doing any work at all near a road bed and track of a railroad used in the operation of a smelter? A. No, sir.

Q. During the latter part of April 1945 did you direct or participate in the punishment of one J. G. Grant? A. No, sir.

Q. Did you have anything to do with knocking him into a drain or cess pool? A. No, sir.

Q. Did you strike him or beat him or hit him in any manner, shape or form? A. No, sir.

Q. What were you doing during the month of April, 1945? A. I was working as a clerk at the warehouse office at the factory.

Q. During the month of December 1944 did you at any time line up about 30 members of the prisoners of war who had been members of the armed forces of the United States for making mittens and the linings from pieces of blankets and cause them to strike and beat each other? A. No, sir.

Q. What were you doing during—this was at the camp. What were you doing during December 1944? A. In the month of December 1944 I was at the mine.

Q. And during the month of August 1945 did you impose any punishment on Thomas J. O'Connor for breach of camp rules by assaulting, striking or beating Thomas J. O'Connor? A. No, sir.

Q. Or did you do anything to knock him into a drain or cess pool of the camp? A. No, sir.

Q. What work were you doing during August, 1945?
A. I was still working at the factory warehouse office as a clerk.

Q. And until what date in 1945 were you working there? A. Until the 16 or 17 of August, 1945.

Q. And during the time were you punching a time clock at the warehouse factory? A. Yes, sir.

Q. Quitting time at 5:10 in the afternoon? A. Yes, sir.

* * * * *

Q. In July or August of 1945, during the afternoon, did you come back with any working party prior to 5:10 in the afternoon? A. No, sir.

Q. Did you during that month compel or have anything to do with compelling David R. Carrier and George Simpson to run around the compound at all* A. No, sir.

Q. Did you compel them to run faster or do four or six more laps around the compound? A. No, sir.

Q. What work were you doing the July or August of 1945? A. I was doing clerical work in the warehouse office and factory.

* * * * *

Q. On or about December 17, 1944 did you order and compel Johnie T. Carter to carry a heavy log up an icy slope? A. No, sir.

Q. Did you ever see Johnie T. Carter injured or hurt on any such log-carrying detail? A. No, sir.

Q. Did you see Johnie T. Carter slip or fall or receive any spinal injury? A. No, sir.

*It will be noted that the punishment of running around the compound was for coming back too early from their work detail. The testimony is that it happened about 4 o'clock.

Q. If you had, what would you have done? A. I would have taken him to the *mine* hospital.*

Q. Were there orders from your superiors, themselves, to do that? A. I would ask the foreman for permission to take the prisoner of war to the mine hospital.

Q. Were there general orders as to men injured to be taken to the mine hospital? A. Yes, sir.

Q. And just what were those orders? A. When prisoners of war are injured, they should be taken to the mine hospital for treatment of any kind.

Q. Did you at any time delay the removal of Johnie T. Carter from the mine to the camp? A. No, sir.

Q. Did you in May, 1945 order John J. Armellino to carry two heavy buckets of white lead instead of one bucket of lead? A. No, sir.

Q. Did you have any authority to do that? A. No, sir.

Q. Where were you working in *May* of 1945? A. I was working in the factory office as a clerk.

* * * * *

Q. Did you then and there strike and beat John J. Armellino in order to compel him to perform this work? A. No, sir.

Q. Did you have any authority to strike or beat him to do any work? A. I did not.

Q. Did you have any order to compel him to do that work? A. No, sir.

Q. In the late spring or early summer of 1945, within the confines of Camp Oeyama did you participate in or

*Kyoshi Mori testified that there was a mine hospital with four Japanese doctors close to the mine.

assist the military personnel of the camp in directing and executing any punishment upon Woodrow T. Shaffer? A. No, sir.

Q. Did you at any time tell Woodrow T. Shaffer that he should kneel or be placed upon a platform or be otherwise punished? A. I did not have any authority to say so.

Q. Well, did you say that? A. No, sir.

Q. Were you present when such a thing occurred? A. No, sir.

Q. Where were you working during the late spring or early summer of 1945? A. I was working at the warehouse office as a clerk.

* * * * *

Q. Where were you working in October of 1944? A. I was working at the mine at that time.

* * * * *

Q. Did you at any time while you were working in Oeyama ever have any intent to betray the United States?

A. No, sir.

Q. Did you at any time while you were working in Oeyama have any intent to give aid and comfort to the Japanese government? A. No, sir.

Q. Did you at any time while you were working in Oeyama do this work with any intent to help the United States lose the war and help Japan win the war? A. No, sir.

Q. Did you at any time do anything there to compel any members of the American armed forces to become abjectly subservient? A. No, sir.

Q. Did you at any time do anything to attempt to destroy the morale and the physical and mental well-being

of the members of the armed forces of the United States?

A. No, sir.

Q. When you came to Oeyama after your return from China did you at any time do any work in classifying or helping to classify any of the prisoners of war by identification? A. No, sir.

Q. As far as you knew, were the prisoners already all classified and entered? A. So far as I know, I think they were. . . .

* * * * *

Q. Did you ever have a conversation with Sgt. Carrier in which you said in substance and effect—in which you discussed General MacArthur? A. No, sir. There was orders at the camp not to talk anything about the war, politics or anything, or about ourselves.”

Q.

Meiji Fujisawa, the government's witness and interpreter, testified as follows:

“Q. Did you during any time that you were in Oeyama from August 8th, 1944 until August 25th, 1945, hear from any source whatsoever that Tomoya Kawakita had struck, beaten or in any way assaulted J. C. Grant?

The Witness: No, sir.

Q. By Mr. Lavine: Did you at any time while you were at Camp Oeyama, from August 8th, 1944 until August 24th, 1945, hear from any source whatsoever that the defendant had kicked or struck Philip D. Toland? A. No, sir.

Q. Did you at any time from *August 8th, 1944 until August 24th, 1945*, while you were at Camp Oeyama, hear from any source whatsoever that the defendant had lined

up or struck any of 30 members of the armed forces of the United States for cutting up blankets? A. No, sir.

Q. Did you at any time while you were at Oeyama, between August 8th, 1944 and August 24th, 1945, hear from any source whatsoever that the defendant struck one Marcus A. Rael? A. No, sir.

Q. Did you hear from any source whatsoever while you were at Oeyama between August 8th, 1944 and August 24th, 1945, that the defendant had compelled one David Carrier or George R. Simpson to run around a quadrangle at the camp? A. No, sir.

Q. Did you hear from any source whatsoever between August 8th, 1944 and August 24th, 1945, that the defendant had compelled and commanded one John J. Armellino to carry two heavy buckets of white lead 500 feet and did strike and beat John J. Armellino? A. No, sir.

Q. Did you hear from any source whatsoever that Tomoya Kawakita, from August 8th, 1944 to August 24th, 1945, did assist the Japanese military personnel in directing or executing any punishment on Woodrow T. Shaffer? A. No, sir.

Q. What was your job in reference to interpreting any notes or any letters between any prisoner of war and the camp commandant? A. If any complaints or any requests were brought in by the prisoners of war they were translated by me.

Q. And was there ever at any time while you were at Camp Oeyama any complaints brought in to you to translate to the camp commandant regarding Tomoya Kawakita? A. No, sir.

Q. Were there rules and regulations posted in the camp regarding the conduct of prisoners of war? A. Yes, sir.

Q. Where were those rules and regulations posted?

A. They were posted in each hut and also from time to time they were posted on the bulletin board.

Q. And what did those regulations say as near as you can remember? A. Sanitation regulations—do you want me to enumerate some of the rules and regulations?

Q. Yes, enumerate all that you recall, Mr. Fujisawa. A. Concerning sanitation, no man was to drink unboiled water, and no man was to eat raw vegetables. All men should at least wash their clothing once a week and after using the latrine they should wash their hands and use a disinfectant that was provided outside the latrine. That is all I can think of of sanitation right now. And then no man was to smoke in bed and if they are going to smoke they have to sit on the bench and smoke. No man is to have any matches—any knives. And no pilfering to be done.

Q. Was that no pilfering to be done? A. Pilfering, yes.

Q. And by pilfering you mean stealing? A. Yes, sir. Well, the hours, reveille hours and tap; well, the day's hours were posted, the time they get up in the morning, have their breakfast, the time they go out to work and the time they come back to the camp from work, and the time that they had their supper. That is all I can recall right now.

Q. What did it say about punishment for violation of the rules, if anything? A. Yes, sir.

Q. Were punishments announced on this blackboard? A. Yes, sir.

Q. Did you have occasion to see the punishment of Woodrow Shaffer? A. Yes, sir.

Q. Did you know what Woodrow Shaffer was being punished for? A. I think he was punished for breaking into the store house." [R. 3670-3676.]

Sgt. Montgomery testified:

"Q. And as a sergeant were you quartered in a different place than the other men who were privates? A. No, sir. I was at that time assigned to barracks No. 2 as the barracks leader.

* * * * *

A. Later they were—well, when we first arrived in the camp there were—let's see; I think there was one British sergeant who had separate quarters.

Q. What was his name? A. Sergeant John Harvey.

* * * * *

Q. Did you know another sergeant named Sergeant Dean? A. That is Warrant Officer Dean.

Q. Warrant Officer Dean. Did you know another sergeant named McElheny, or was he a petty officer? A. I knew a chief yeoman in the United States Navy by the name of McElheny.

* * * * *

Q. Did you know Tugby? A. I knew a warrant officer Tugby of the Canadian Army.

Q. That was the same as the British warrant officer? He is the same as our master sergeant, is that correct? A. Yes, sir.

Q. Did you associate with these four men whom I have named? A. From time to time I did; yes, sir.

Q. And did you have anything to do with the discipline of the men in the camp? A. Yes; I did.

Q. Did you sit with any of these four people I have named to pass on punishments for men who had violated some camp regulation? A. Now, if we are going into that, this should be discussed.

* * * * *

A. I never sat with them, no; I discussed it with them many times.

The Court: By 'them' whom do you mean? A. Major Beadnell, Captain Bleich, Lt. Bryant, Warrant Officer Dean, Warrant Officer Purcell, the man I knew as Warrant Officer Rogers. Later on I understand he was a sergeant. A Canadian Warrant Officer by the name of Tugby.

Q. By Mr. Lavine: When you say you discussed with them, you discussed the various violations of the men in the camp with them from time to time and what punishment should be meted out? A. That was to prevent the severe punishment of the Japanese.

Q. Would you listen to my question? * * *

* * * * *

Q. By Mr. Lavine: And the punishment that was carried out was carried out by these men from time to time, was it not, these American, British, and Canadian petty officers, for violations in the camp; isn't that correct? A. Yes, sir." [R. 205-208.]

R.

The Following Is the Testimony of the Different Witnesses Which the Government Introduced to Show "Intent" to Betray. We Request the Court to Examine These Closely to See if Anything Can Be Found in Any of Them That Would Show Treasonable Intent.

Witness David R. Carrier:

"A. Well, sir, he asked me what I thought of General MacArthur and I told him I thought MacArthur was all right. He asked me if I didn't think it was pretty dirty of him for leaving us in the Philippine Islands and going to Australia. And I replied that he was our commander and had orders the same as we did and he had to obey them the same as we did. And Kawakita replied that he thought it dirty of him for leaving us like that and he wasn't no good.

Mr. Lavine: Just a minute. I move to strike all that answer. Certainly, I thought it was going to be a different line of conversation, and certainly that is irrelevant, incompetent and immaterial on the different grounds, your Honor. It does not show any relationship to the crime on trial.

The Court: Isn't it relevant to the issue of the intent?

Mr. Lavine: Not as to discussion regarding an American general. I do not see how that could be relevant to intent, your Honor.

The Court: Motion denied." [Rep. Tr. p. 365, lines 6-25.]

Witness Marcus Rael:

“A. Well, he was rushing us up, telling us to hurry—‘Get the God damn unloaded,’ and, well, he was just rushing us up all the time to get the car unloaded.

Q. How many men were in that detail, do you recall?

A. No, I don’t

The Court: Is this an act charged in the indictment?

Mr. Lillie: No, your Honor.

The Court: I admonish the jury again with respect to any incidents alleged to have taken place involving the defendant, which are not charged in the indictment.

This evidence is received for the sole purpose of indicating the state of mind or the intent with which the defendant acted, if you find he did the acts charged in the indictment.” [Rep. Tr. p. 600, lines 4-22.]

Witness Paul Sarno:

“The Witness: He says to me, he says, ‘It looks like MacArthur took a run-out powder on you boys’!

Naturally in the position I was in at the time I didn’t answer. A few seconds later he says—he says, ‘The Japanese were a little superior to your American soldiers.’” [Rep. Tr. p. 648, lines 1-6.]

Witness Paul Sarno:

“Q. And you took their temperatures, is that correct?

A. Yes, sir.

Mr. Lavine: I object to this as incompetent, irrelevant and immaterial. * * *

We are not here trying him for war crimes.

The Court: * * *

The defendant here is charged with certain acts of treason. These acts are set forth in the indictment. Evi-

dence of any other occurrence is admitted here for the sole purpose not to prove the defendant did the acts charged in the indictment, but for the sole purpose of tending to show his state of mind in doing any acts which you find from the evidence he may have done, if any.

* * * * *

Q. By Mr. Lillie: At that time you had taken the temperatures of these prisoners, is that correct? A. Yes, sir.

* * * * *

Q. By Mr. Lillie: Now, at that time did you see the defendant? A. Yes, I had these men laying down on these benches that we used to eat our chow—sit down on, and Kawakita came in and said, 'What are all these fellows doing down here?'

I says, 'Well, they got permission from the Japanese hanches to come downstairs,' and I says, 'I took their temperatures and went up to the Japanese guards and I got permission to keep them down there to rest.' I says, 'They are all run down and they can't work.'

He says, 'What do you mean, they can't work?'

I says, 'They just can't work.'

He says, 'Well,' he says, 'we are not feeding these fellows out here,' he says, 'not to work.' He says, 'Tell the doctor when you go in we only want men out here that can work.'

So, I didn't say anything else. He says, 'Don't forget to tell the doctor,' he says, 'When you go in that we only want able-bodied men that can work.' He says, 'From now on, anybody that can't work won't get anything to eat—no rations,' and their rations were taken away from them if they didn't work a half day in the morning.' [Rep. Tr. p. 651, line 11, to p. 654, line 17.]

Witness Nathan Sutton:

"The Witness: Yes, sir; I do. We were working on the ore cars. The defendant came up. The hanchō was present. Then he turned around to us and said, 'Stop working on the ore cars. Start cleaning up this track.' I didn't hear no words going between the hanchō and the defendant—

Mr. Lavine: I move to strike the last part of the answer as a volunteer answer, your Honor.

Mr. Carter: He said what he heard.

The Court: Motion denied.

Q. By Mr. Carter: This hanchō you referred to was the Japanese hanchō? A. Yes, sir.

Q. Did the American prisoners of war then stop work on the ore cars? A. Yes, sir; we started picking up rock." [Rep. Tr. p. 724, line 17, to p. 725, line 6.]

"Q. What was said and one at that particular time?

Mr. Lavine: Objected to—

A. He told us—

Mr. Lavine: Just a minute. Objected to as irrelevant, incompetent, immaterial, not within the issues charged in the indictment.

The Court: Overruled. You may answer.

A. He told us that if we would raise our quota of loads, we would be getting more food; and if we raised our quota, we would be able to quit earlier. * * *"
[Rep. Tr. p. 726, line 21, to p. 727, line 4.]

Witness Frank E. Mine:

"Q. By Mr. Lillie: Do you recall a conversation you had after an air raid? A. Yes, I recall a conversation after an air raid. It was to the entire camp that was at

work at the time at the factory that this occurred one time. The approximate date was about a month before the end of hostilities. Mr. Kawakita himself stepped up and he made a statement that, 'We shot down all of your planes.' This was a bombardment of Miasi—a miasi bombardment by the Americans. He said 'We shot down all your planes. We have very good anti-aircraft. You Americans don't have no chance. We will win the war.'"

[Rep. Tr. p. 791, lines 6-17.]

Witness Wm. Gage, Jr.

At a conversation in the rest han at the mine, only the defendant and witness present, in November 1944.

"Q. What did you say and what did the defendant say?

Mr. Lavine: Objected to as irrelevant, incompetent and immaterial, and not within the issues.

The Court: Overruled. You may answer.

A. Why, I asked Kawakita how long he thought the war would last.

Q. By Mr. Carter: What did he say? A. He answered '20 years and Japan will win it.' " [Rep. Tr. p. 881, line 19, to p. 882, line 1.]

And a later conversation the same month:

"Q. Who was present? A. I don't remember anybody being present except the defendant and myself.

Q. What was said by yourself and the defendant?

Mr. Lavine: The same objection, your Honor; incompetent, irrelevant and immaterial.

The Court: Objection overruled.

The Witness: I asked, when we were talking about things in general, and I was always trying to get some-

thing out of him where I could get a little uplift for morale purposes, and this particular morning the conversation got around to—I asked him what he was going to do and if he thought he would ever get back to the States. He said yes, he said he would come back to the States, and he said when he got back he would be a big shot because he knew the country, he knew the people and he knew the language.” [Rep. Tr. p. 882, line 16, to p. 883, line 6.]

Witness Morton Feinberg:

“A. Well, I didn’t have a conversation with him, but I was in a group of men that he addressed and the remark that he made was that we wouldn’t get out of that camp for 50 years and we didn’t think the Americans would win the war, did we?

Q. Was that all that was said at that time? A. That is about all * * *

Mr. Lavine: And may I interpose the basic objection because I didn’t want to interrupt the witness. It is incompetent, irrelevant and immaterial.

The Court: Yes, you may, and the objection is overruled.” [Rep. Tr. p. 962, line 13, to p. 963, line 3.]

On an occasion at the mine:

“A. There was a group of men—about 20 men.

Q. On that occasion did the defendant have anything to say? A. Yes. He would come along and say, ‘Come on, you guys are not working fast enough. Let us put out a little work here.’ ” [Rep. Tr. p. 964, lines 4-9.]

And at the factory:

“A. Why, yes. His statements usually ran the same as up at the mine. ‘Come on, hurry up. Let’s put out more work.’ ” [Rep. Tr. p. 965, lines 2-4.]

Witness Gid Spurlock. On an occasion at the factory:

“Q. The defendant was there and you were there?

A. Yes, sir.

Q. What did he say to you?

Mr. Lavine: Objected to as incompetent, irrelevant and immaterial and not within the issues in this case.

The Court: Objection overruled.

Q. By Mr. Carter: What did he say?

* * * * *

A. Well, he said, ‘Get up and get to work.’

Q. Anything else? A. No, that is about all.” [Rep. Tr. p. 1079, line 19, to p. 1080, line 11.]

Witness George Mayo. On occasions both at the mine and factory:

“Q. Do you recall whether or not the defendant ever made any statements to you? A. To me? Well, at the factory—I mean at the mine he has come around and said, ‘Get going. Get to work,’ such statements as that.

Q. Well, how frequently would he make those statements? A. Well, any time he came around where we was working.” [Rep. Tr. p. 1158, lines 12-18.]

“Q. Did you ever see the defendant in any of the rest shacks? A. Yes, sir. We would be taking a morning break or afternoon break, you are supposed to get—well, whatever time it was, 10 or 15 minutes. He would come in before the time was actually up and say, ‘You guys get going,’ and run us out of the rest shack. He would stay and warm a while, and come out and tell us we could work and keep warm.” [Rep. Tr. p. 1159, lines 3-10.]

On an occasion when they came in from the mine and were lined up for the count-off:

“Q. Who lined you up? A. Well, they always lined us up, the Japanese—Ichiba and Akamatsu and several of them, and they sometimes had a practice of checking our mess gear—kits. We carried our mess kits in for kindling wood and things were brought in, so this particular evening they found several pieces of kindling on several of us. I don’t know all of the guys. Well, in fact I don’t remember any of their names but one, I don’t think, and after all the rest of the men was dismissed Kawakita told us to line up by the jimisha, the office, and made us take the kindling out of our mess kits and hold it in our hand and he came by and said, ‘Don’t you know you are not allowed to have this kindling?’ And asked what we were doing with it and we told him we brought it in to build a fire with, so he took it and said ‘Don’t you know it is against the camp rules and regulations?’ And he took it and struck us across the face with it and dismissed us.” [Rep. Tr. p. 1160, lines 7-24.]

On an occasion at the factory mess hall in July 1945:

“The Witness: Well, several prisoners sitting around. I don’t remember their names. Several of us sitting around outside the mess shack. We were talking about, naturally, when the war would be over and Kawakita walks up and hears the statement—he hears what we was talking about and he said, ‘Well, you guys needn’t be interested in when the war will be over because,’ he said, ‘You won’t go back; you will stay here and work.’ He says, ‘I will go back to the States because I am an American citizen.’” [Rep. Tr. p. 1166, lines 14-22.]

Witness John Armellino. In October 1944 at the mine:

“Q. By Mr. Lillie: When did you first see the defendant? A. We seen him coming over the hill, sir, and we were standing around, grouped up, and right away as he came over the top of the hill he just yelled out at us the following statement: He said, ‘Get to work, you sons of bitches.’ He said, ‘You are not here at a damn bingo game,’ and at that time he had a stick in his hand and he swung it. I managed to get out of the way. Then he yelled, ‘You are not here for your damn health.’ And at that time he caught somebody full across the back who was not quick enough to scamper out of his way. That was my introduction to Kawakita.” [Rep. Tr. p. 1211, lines 13-23.]

* * * * *

Witness Arthur Staninger.

In September 1944, at the mine; POWs and 2 or 3 guards present:

“Q. What did you hear Kawakita say at that time?

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, and not within the issues of this case.

The Court: Overruled.

Mr. Carter: You may answer the question.

A. Kawakita told us that we were prisoners of war, and he says, ‘I guess you fellows understand the circumstances. If you don’t work, why, you will suffer.’

Q. Was there any Japanese person standing by or near Kawakita at the time he made this statement? A. All I remember is one of the guards that was standing near.

Q. Did you see the Japanese guards at or about that time conversing with Kawakita? A. The guard didn’t say a word.

Q. Did you ever recall an incident involving Kawakita and a Japanese guard? A. Yes; I recall Kawakita slap a guard at the mine.

Mr. Lavine: Defendant objects to that as irrelevant, incompetent, immaterial, and move to strike the answer.

The Court: Sustained. The motion is granted. The jury is instructed to disregard it.

The preceding incident which the witness has related, ladies and gentlemen of the jury, is an incident, of course, not charged in the indictment, and received in evidence here for the sole limited purpose that I have explained to you heretofore with respect to incidents not alleged in the indictment—only for the purpose of enabling you to determine from surrounding circumstances and other acts, as well as evidence of the acts charged in the indictment, the intent or state of mind with which the defendant did the acts charged in the indictment, if you find after the close of all the evidence that he did those acts.” [Rep. Tr. p. 1277, line 4, to p. 1278, line 11.]

An incident at the camp:

“A. Well, when he got—

Mr. Lavine: I object to that as incompetent, irrelevant and immaterial, your Honor, the basic objection.

The Court: Objection overruled. You may answer.

The Witness: When he got in the guard searched all of them and they found this one onion on Toland.

Mr. Lavine: This is not an incident, as I understand, charged in the indictment.

Mr. Carter: It is not testimony directed to any overt act, if the court please.

Mr. Lavine: Object to it as incompetent, irrelevant and immaterial.

Mr. Carter: Offered for the purpose of generally showing the intent of the defendant.

The Court: Very well. It will be received for that limited purpose only. Proceed.

The Witness: This happened after work. Toland was working—

Q. By Mr. Carter: Will you speak a little louder?

The Witness: Toland was working at the camp, the factory. He came in and the guard searched him. They found this one onion on him, so Kawakita came up and sent all the rest of them in the barracks and made Toland run around the compound about eight or nine times.” [Rep. Tr. p. 1280, line 8, to p. 1281, line 5.]

“The Court: * * *

That incident also, ladies and gentlemen, which the witness just related about the onion is not one of the acts charged in the indictment and of course the evidence as to that is limited, as I previously explained to you, for the sole purpose of determining the state of mind or intent with which the defendant acted, if you find from the other evidence that he did act as charged in the indictment. I do not need to say to you that proof or evidence that the defendant did something with respect to an onion is not evidence he did something with respect to something else. Evidence that he may have done other acts than those acts charged in the indictment is not in any sense evidence that he did the acts charged in the indictment, so that evidence, again, I say, is placed before you for the sole purpose of enabling you to judge and determine the state of mind and intent with which the defendant acted, if you find from the other evidence that he did act as charged in the indictment.” [Rep. Tr. p. 1281, line 17, to p. 1282, line 9.]

Witness Maury Rich.

End of December 1944, at the sawmill in the factory, about 9 Canadians also present:

“Q. All right. Tell us what occurred and what the defendant said, if anything, at that time?

Mr. Lavine: I object to that as incompetent, irrelevant and immaterial; not within the issues of the case.

The Court: Objection overruled.

The Witness: We were eating our lunch out of our mess gear and sitting around on the ground. Kawakita came up and he looked into our mess gear and wanted to know what we were eating, and one of the boys spoke up and said—we told him it was American corned beef that we got in Red Cross packages, and he says, ‘You better make good use of that American garbage because you will never get to eat any more of it,’ and he kicked one fellow’s mess kit out of his hand, and he told us to get the hell out and go back to work before we got through eating.” [Rep. Tr. p. 1332, line 22, to p. 1333, line 11.]

And about a week later with same persons present:

“A. And he told us that the Americans were losing the war.

Mr. Lavine: I object to this as incompetent, irrelevant and immaterial.

The Witness: And that San Francisco was being bombed.

The Court: Just a minute.

Mr. Lavine: Object to it as incompetent, irrelevant and immaterial, and not within the issues of this case.

The Court: Overruled.

The Witness: And he says 'We will kill all you prisoners right here anyway, whether you win the war or lose it. You will never get to go back to the States.'

* * * * *

A. Well, one time we were bringing in logs which they used for boards, and this was in a cold month. I think it was around March of 1945, and we rolled down one log that was too heavy for four men to carry, and we were waiting for the other four men to come in, and at that time Kawakita came up and he says, 'What the hell is the matter with you sons of bitches? Here, get going here,' and we told him it was too heavy for four men to carry and at that time he stood me at attention and he whacked me across my left arm with a saber of some kind.

Mr. Lavine: Just a minute. I object to that as not within the indictment and not within the issues of this case, and move to strike the answer, your Honor.

The Court: The motion is denied. These incidents which the witness has testified to up to this point, I believe none of them are in the indictment, are they?

Mr. Carter: It is offered for the purpose of showing intent.

The Court: The evidence is offered, as I understand it, for the limited purpose and received for the limited purpose which has heretofore been explained to the jury.

* * * * *

The Court: It is not one of the overt acts, and neither are the statements which the witness has testified to up to this point.

Proof of statements or other acts of course, do not constitute evidence of the overt acts alleged in the indict-

ment as I said to you earlier today. This evidence is received for the sole and limited purpose of enabling you to determine, upon the close of the case, the intent or state of mind with which the defendant acted, if you find from all the evidence in the case that he did act, did the acts charged in the indictment or any of them.” [Rep. Tr. p. 1334, line 4, to p. 1336, line 7.]

“Q. By Mr. Lillie: * * * Did you look at your wrist and your arm? A. They were bleeding severely and I asked to go for medical attention and he told me they couldn’t waste any good medical aid on a bunch of lazy Americans.

Q. By the Court: Who told you that?

The Witness: Kawakita, sir.” [Rep. Tr. p. 1336, lines 19 to 25.]

Witness Alexander Holik.

In October 1944 at the mine, with the hanchō and four others present, one of the men asked Kawakita his opinion of the war:

“A. He says we will never go back to our wives and families. He says the Japanese are going to win the war and he is going to be No. 1 man over here, and he was coming back to the United States.” [Rep. Tr. p. 1400, lines 6 to 9.]

And at the factory while unloading cement:

“Q. Did you hear Kawakita say anything or observe him do anything at or about that time? A. Yes. He told me to hurry up; I was too slow. So he gave me a push and a bag of cement fell on my back.” [Rep. Tr. p. 1402, lines 7 to 10.]

Witness Howard L. Cope:

In February 1945, at the factory, first saw D. Several Hanchos, two Britishers and Sgt. Gage present.

“Q. What was the conversation?

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, and not within the issues of this case.

The Court: Overruled. You may answer.

A. Well, at that time I was working in the kitchen there. They had a small soup kitchen that they cooked soup for the prisoners for their noon meal. And I had walked into the section of the kitchen there or the rest hut where the Japanese guard and hanchos used for their paper work and where they sat around when the prisoners were in there. When I came out, why, someone asked me if I wasn't a damn Yank. I was more or less surprised. I hadn't heard anything English spoken in there. So I turned and said I was. And I saw this defendant. And he says, 'Where did you go to school?' And I told him I went to school at Eureka, North Carolina. He said, 'I never heard of the place.' At the time, he was wearing a heavy, dark sweater with a large yellow 'C' on it, an athletic letter. And I said, 'I see that you have been to school somewhere.' He says, 'You have got an athletic number.' I says, 'Where was it?' And I don't recall where he said, but I said 'Well, I don't think I have heard of that place, either.' I asked him if it was a Government sponsored institution in the States, and he slapped me, and he says, 'They never gave me a damn thing.'

Mr. Lavine: I move to strike the testimony, your honor, as irrelevant, incompetent and immaterial.

The Court: Motion denied. * * *” (Jury again admonished *re* incident not charged as overt act to be con-

sidered solely on question of state of mind or intent.) [Rep. Tr. p. 1374, line 12, to p. 1375, line 23.]

Witness James T. Phillips.

“Q. Do you recall another occasion in which there was some conversation between yourself and the defendant concerning the subject of food or chow? A. Well, this happened shortly—it was around March or May, sometime around there, and it was in the same barracks, same han. The defendant came in, Kawakita came in with either Akamatsu or the camp commandant, I can’t recall which.

Q. Anybody else besides the two of them come in? A. Just two of them, that is all.

Q. Who was present? A. Joe Edmunds, myself—oh, there were four or five British around there.

Q. And what time of the day did this occur? A. It happened at the noon meal.

Q. What did the defendant say, if anything? A. He said still the patients were getting too much rice.

Mr. Lavine: Just a minute. Pardon me. I object to that as incompetent, irrelevant and immaterial, and not within the acts charged in the indictment, and it is prejudicial to introduce this type of testimony without any foundation.

Mr. Carter: It is offered for the sole purpose of showing intent.

The Court: Objection overruled. The testimony will be received for the limited purpose of showing the intent or state of mind with which the defendant acted if you, the jury, find from all the evidence in the case he did act as charged in the indictment.” [Rep. Tr. p. 1502, line 9, to p. 1503, line 13.]

See page 1505, line 13 *et seq.* for agreement as to instruction when evidence received for limited purpose of intent.

“Q. By Mr. Carter: Sgt. Phillips, just before the adjournment I had asked you if you recalled a conversation or some statement made by the defendant concerning the general object of winning the war; and I think you had indicated that this occurred in the presence of certain people that you named at the camp hospital. A. That is right.

Q. Is that right? A. That is right.

Q. And approximately when did this conversation occur? A. Sometime in the spring of 1945.

Q. Will you relate what was said by the defendant and anyone else then present? A. I do—

Mr. Lavine: Wait just a minute. I object to that as irrelevant, incompetent, immaterial, and not within the issues of the case.

The Court: Overruled.

Mr. Carter: I stated previously that this was offered for the purpose of showing intent and state of mind on the part of the defendant, when we had the discussion between us here.

The Court: Very well; it will be received for the limited purpose of showing intent and state of mind.

Q. By Mr. Carter: Will you state what was said at that time? A. He said Japan would win the war if it took a hundred years; also, that the Japanese were far superior to the American people and if the American army had Japanese officers, why, they could whip the world.”
[Rep. Tr. p. 1509, line 13, to p. 1510, line 17.]

Witness Philip B. Toland.

In March 1945, in the factory area:

“Q. By Mr. Lillie: What was the statement?

Mr. Lavine: Object to that as incompetent, irrelevant and immaterial.

The Court: Is it offered for the limited purpose of showing the state of mind of the defendant?

Mr. Lillie: Intent, yes, sir.

The Court: Objection overruled. It is received for that limited purpose only. You may answer the question.

The Witness: Well, I was working—I was picking up sticks from around the area and I heard Kawakita mention the word ‘Hate’, so I picked up about two or three more sticks and I turned around and I heard him make the statement, ‘I wish you were all dead.’” [Rep. Tr. p. 1641, line 21, to p. 1642, line 8.]

Witness David Huddle.

In November, 1944, at the factory or the mine:

“Q. Did you ever have a conversation with him or were you ever present when Kawakita had something to say on the general subject of the amount of work? A. Yes; I was.

Q. Where? A. At the mine, at the levels where we were working.

Mr. Carter: This is offered, your Honor, on the general subject of intent and state of mind of the defendant.

Mr. Lavine: May the record show that I interpose an objection as irrelevant, incompetent, immaterial, not within the issues?

The Court: Objection is overruled. The testimony of any acts other than those charged in the indictment, if received, is received for the sole limited purpose of enabling the jury to determine the state of mind or the intent with which the defendant acted, if the jury should find from all of the evidence, upon the close of the case, that the defendant did act as charged in the indictment.

Q. And referring to this conversation on the general subject of the amount of work, who was present? A. The men on the detail I was working with.

Q. Was the defendant there? A. Yes, sir.

* * * * *

Q. What did you hear the defendant say? What was said at that time?

Mr. Lavine: To which I object as incompetent, irrelevant and immaterial, and not within the issues of the case.

The Court: Is this offered only on the issue of intent?

Mr. Carter: Yes.

The Court: Objection overruled, and it will be received for that limited purpose.

* * * * *

The Witness: I heard the defendant say for us to hurry up, 'Get out more loads,' and that we were killing time." [Rep. Tr. p. 1696, line 9, to p. 1699, line 4.]

And at about the same time:

"Q. By Mr. Carter: Just state, Sergeant, what the defendant said, if anything, on this day in question following the day that you had made your quota. A. The defendant said that we got our quota and had time to rest and that our quota would be raised more for the following day." [Rep. Tr. p. 1700, line 25, to p. 1701, line 5.]

And regarding the rest periods:

“Q. How much more of your rest period was there to go? A. About five minutes more.

Q. Will you state what transpired at that time, what you heard and what you saw?

Mr. Lavine: Object to that as incompetent, irrelevant and immaterial, and not within the issues of this case.

Mr. Carter: It is offered on the question of intent and state of mind of the defendant.

Mr. Lavine: There is no foundation to show that the defendant was responsible for anything that happened during the rest period.

The Court: Will the defendant be connected with this?

Mr. Carter: Yes.

The Court: The objection is overruled and the evidence will be received for the limited purpose of showing the state of mind and intent.

Q. By Mr. Carter: State what you saw and heard at that time? A. At that particular time Kawakita chased us back out of the rest hut to work before our rest period was up.

* * * * *

A. What I heard was, Kawakita said, ‘All right, men, back on the job.’” [Rep. Tr. p. 1702, line 13, to p. 1704, line 14.]

And in December of 1944 at the mine:

“Q. What did you hear the defendant say at that time and place? A. Well, at that time the defendant mentioned that we needn’t worry about the war or the ending of the war, because we would never get back to the United States.

Q. What else, if anything, did he say? A. Well, he made the remark that he was going back to the United States to be a big shot, because he knew the Japanese and the English language, both.

Q. Do you recall any—

Mr. Lavine: Wait a minute. I make the objection to that as incompetent, irrelevant, immaterial, not within the issues of the case.

The Court: The objection will be deemed made in advance of the answer given and overruled. I take it that evidence is offered—

Mr. Carter: Offered on the question of intent and state of mind of the defendant.

The Court: And is received for that limited purpose.” [Rep. Tr. p. 1705, line 23, to p. 1706, line 16.]

And in January 1945, at the mine, before 300 Americans and British POWs.

“Q. All right. Now describe what you saw and what you heard at that time A. Well, at that time Kawakita was standing up in front of the entire group. He told us that we hadn’t reached our quota in loads of ore and therefore our noonday soup would be taken away from us.

Q. Was it taken away? A. It was.” [Rep. Tr. p. 1707, lines 5 to 12.]

Regarding an incident involving the subject of chewing gum; at the factory, in April 1945:

“Q. What occurred on that particular occasion?

Mr. Lavine: Object to it as irrelevant, incompetent and immaterial, and not within the issues of this case. There is no incident of chewing gum here. I don’t know what the purpose of it is in this case, your Honor.

Mr. Carter: Offered on the general subject of the intent and state of mind of the defendant.

The Court: The objection is overruled. It will be received for that limited purpose.

Q. By Mr. Carter: State what happened at that time, Sergeant. A. At that time Kawakita stopped me and asked me if I was chewing gum, and I said—

Q. What did you say? A. I said I wasn't. Kawakita grabbed me by the shirt collar and told me to open my mouth. Well, I didn't have a chance to swallow the gum and I tried to conceal it under my tongue. And when I opened my mouth he saw the gum. He says, 'You lie,' and he drew back—he held me with his left hand by the shirt collar, and he drew back with his right and he hit me three times in the nose and just broke my nose.

Mr. Lavine: I move to strike the incident as having no relevancy to the crime of treason, your Honor.

The Court: The evidence is received for the limited purpose of showing the state of mind. It is on that issue and that issue alone. It doesn't tend to prove or disprove and is not offered or received as tending to prove or disprove any act alleged in the indictment." [Rep. Tr. p. 1714, line 4, to p. 1715, line 7.]

Witness John L. McCoy.

In October or November 1944, at the mine:

"Q. What did the defendant say, if anything, and what did you or whoever you heard him talking to have to say?

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, and not within the issues of the case.

Mr. Lillie: It goes to the state of mind.

The Court: Is it offered for that limited purpose of showing intent?

Mr. Lillie: Yes.

The Court: Objection is overruled and the evidence is received for the limited purpose on the issue of intent.

A. He asked me how I was getting along and I said, 'I was getting along.' He asked me how I would like to be in the Biltmore eating a nice big steak. I said 'Very much.' He told me at that time that the Japanese had driven the Americans out of the Pacific; they had shot down all the American planes and sunk the American ships; and that he soon would be coming to the United States, where he would be a big shot because he knew the language and the people and the country.

* * * * *

Q. Did he say anything further in the conversation?

A. Well, he told us that we were not putting out enough work at that time. Of course, that wasn't anything outstanding; he was telling us that all the time." [Rep. Tr. p. 1776, line 15, to p. 1777, line 17.]

In November, 1944 the question of quotas was being discussed:

"Q. What did the defendant say, if anything, sir?

Mr. Lavine: I object to that as irrelevant, incompetent and immaterial, what he said about the quota.

The Court: Overruled.

* * * * *

A. He said the quotas were too low; that they should be raised; that we should turn out more work." [Rep. Tr. p. 1779, line 8, to p. 1780, line 4.]

Witness Johnnie E. Carter.

In October or November of 1944 at the rest shack:

“Q. Will you relate the circumstances in respect to the conversation and the conversation?”

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, the basic objection, your Honor.

Mr. Lillie: State of mind.

The Court: Overruled.

* * * * *

A. The conversation started out—he asked me where—Kawakita asked me where did I live and I told him in Danville, Virginia, and I asked him where did he live and he said Calexico, California. And he said that he just came back from China. Then he asked me how many ships the Americans had and I said I didn’t know. He asked me how many airplanes the Americans had and I said I didn’t know. I said, ‘you should know better than I do.’

So he hit me on the side of the head with his fist and told me to go back to work.” (Court admonishes jury again received for limited purpose of enabling them “to judge from all the surrounding circumstances, the intent and state of mind with which the defendant acted, if you find from the evidence upon the close of the case that he did act as charged in the indictment.”) [Rep. Tr. p. 1835, line 7, to p. 1837, line 1.]

And the following day at the mine:

“A. Well, the air raid signal went off and everybody moved, and only the defendant and I was left, and he asked me if I knew that those were American planes and I said, ‘American planes have a smooth motor and the

Japanese planes sound like a Maytag washing machine,' and he hit me over the head and over the back with a piece of bamboo that he had and told me to go to the rest shack.

Mr. Lavine: I object to that as incompetent, irrelevant and immaterial, and not within the issues of this case, and not charged in the indictment, your Honor.

The Court: Is it offered on the issue of intent only?

Mr. Lillie: That is correct.

The Court: The objection is overruled * * *.”
[Rep. Tr. p. 1837, lines 10 to 22.]

And at the camp in January or February:

“A. The Japanese guard turned over to Kawakita and he went back to his office after the men was called up. Kawakita asked them what they was doing. They said they was getting some wood for a sick han. And he says, ‘Don’t you know you are not supposed to get it?’ He says, ‘We didn’t get it.’ So he told them to stand up on a stand that was setting right out in front of the jimisha and just a little to your right as you face it. So they stood there for some time. The working party was not in yet, and what Kawakita was going in and out of the camp that afternoon, * * *

Q. By Mr. Lillie: Kawakita then went into the jimisha, you say? A. He went into the jimisha and came back out sometime later. And one of the boys,—I don’t know which one—asked him, he says, ‘Don’t you think we have had enough punishment?’ It was very cold that day. And he says, ‘Face the United States.’ And one of the boys says, ‘Which way is the United States?’ So he went back into the office and a few minutes later he

came back out and told them to face in the direction which was just to the right of the main gate by the guard house. They faced that direction and he told them to salute; so they saluted. He went back inside; a few minutes later he came back out and they asked him the same thing; 'Don't you think we have had enough punishment for this?' So at that time he told the two boys standing on the stand, York and Tracker, to thumb their nose at the United States while he was having a big laugh so far at that time. He called the Japanese that was in the jimisha out and he was explaining to them in Japanese—which I didn't understand—but making the motion in his way (demonstrating), and everybody was getting a big laugh.

Mr. Carter: The witness has indicated with his hands with his thumb to his nose and fingers extended forwards.

The Court: Is that agreed?

Mr. Lavine: Yes; that is agreed.

Q. By Mr. Lillie: How long did this incident take place, to the best of your recollection? A. I don't remember how long, but just a few minutes after that he excused the two men on the stand and let them go back to the sick han.

The Court: Now, is that an incident charged in the indictment?

Mr. Lillie: No. That is for the purpose, your Honor, of showing the intent and state of mind of the defendant, for that limited purpose only.

Mr. Lavine: I move to strike it as irrelevant, incompetent and immaterial, and not within the issues of this case.

The Court: Motion is Denied * * *." [Rep. Tr. p. 1856, line 16, to p. 1859, line 1.]

And in June or July of 1945 while on the rock crushing detail:

“Q. And who was present at the time? A. Well, there was 15 of us working on that detail, and two men had just rolled up a bunch of rock, and I was standing there chucking these rocks in. Well, they shoved these rocks a little too far in the cart this day and they blocked this hopper up where it was crushing the rock. And Kawakita came up and he says, ‘I will be glad when all the Americans is dead, and then I can go home and live happy.’

Mr. Lillie: The purpose of that statement, also, your Honor, was to show the intent and state of mind.

Mr. Lavine: I move to strike as irrelevant, incompetent and immaterial, Your Honor, not within the issues.

The Court: Overruled. The evidence is received, again, for the limited purpose of enabling the jury to judge the state of mind or intent.” [Rep. Tr. p. 1860, lines 3 to 17.]

And on the same detail at night:

“Q. What did he say or do? A. Well, this one particular might he was sitting there, and he asked me, he says, ‘Why does the Americans hate to die and the Japanese like to die?’ And I told him back that the Americans had something to live for and go back to, and all the Japanese had was to live for a bowl of rice the following day.

Q. Did he answer you or do anything? A. Well, he answered me by hitting me over the head and across the back. And he couldn’t tell me to go back to work because we was working by bells. So I moved over away

to the other side of the han, the other side of the rest shack.

Q. What did he hit you with? A. He hit me with a bamboo stick he had been carrying around that night.

Mr. Lavine: Just a minute. I move to strike the entire incident as incompetent, irrelevant and immaterial, not within the issues of the indictment.

Mr. Carter: Offered for the purpose of intent and state of mind.

The Court: Motion denied, and the evidence is received on the issue of intent only." [Rep. Tr. p. 1861, line 15, to p. 1862, line 12.]

Witness James A. Caire.

In December of 1944, at the mine:

"Q. What did the defendant say if anything? A. We were discussing—

Mr. Lavine: Just a minute. I object to this as incompetent, irrelevant and immaterial, and not within the issues of this case.

Mr. Lillie: State of mind, your Honor, and intent.

The Court: Offered for that limited purpose.

The Court: Objection overruled. The conversation will be received for the limited purpose of bearing on the issue of intent or state of mind.

A. We were discussing the election, because it was election year, and he said 'Roosevelt was no good.'"
[Rep. Tr. p. 1981, line 3, to p. 1982, line 5.]

About ten days later, in the mess hall:

"Q. And what was the conversation? A. He asked me—

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, and not within the issues of this case.

Mr. Lillie: For the same purpose as stated previously, your Honor.

The Court: State it again.

Mr. Lillie: State of mind and also for intent.

The Court: Objection is overruled; the conversation will be received for the limited purpose, for whatever it may show relative to the state of mind or intent. You may proceed.

A. He asked me what I was doing in the rest han and I told him that I had been taken down with the cramps and my hanchō told me I could come down to the rest hut and stay until I got better. Then he went back and talked to the two Japanese, and later came back and told me to go out and dig dikons for the next day's meal.

Q. By Mr. Lillie: And did you proceed to go out and dig dikons? A. Yes; I did. It had been snowing that day and I had to dig them with bare hands." [Rep. Tr. p. 1983, line 10, to p. 1994, line 6.]

Witness Woodrow T. Shaffer.

In November of 1944 at the mine:

"Q. And what was said at that time by the persons then and there present?

This is offered for the purpose of showing intent and state of mind of the defendant. It is not one of the overt acts.

Mr. Lavine: To which we object, your Honor, as irrelevant, incompetent, immaterial, and not within the issues of the case.

The Court: Overruled. It will be received for that limited purpose only.

* * * * *

A. Kawakita told me and the other prisoners of war working on the same detail if we would get out eight cars of ore we could knock off. On the same detail the following day—

Q. Now, wait a minute. Did you get out eight cars of ore on that day? A. Yes.

* * * * *

Q. All right. Now, what was said by the defendant and other persons present at that time and place?

Mr. Lavine: To which we object, irrelevant, incompetent, immaterial, not within the issues of this case.

Mr. Carter: Offered, as was the first conversation, for the purpose of showing intent and state of mind of the defendant.

The Court: The objection will be overruled and the evidence will be received for that limited purpose only, as showing the state of mind or intent. You may answer.

A. Kawakita said that we would have to put out 10 cars that day because we quit too early." [Rep. Tr. p. 2043, line 7, to p. 2045, line 23.]

And on the general subject of winning the war at the mine in November, 1944:

"Q. What was said by the defendant at that time and place and what was said by anyone else who was then and there present? A. I asked Kawakita—

The Court: Is this offered—

Mr. Carter: Again, for the purpose of showing intent and state of mind of the defendant.

The Court: It will be received for that limited purpose.

A. I asked Kawakita how the war was coming. He said Japan was winning but it didn't make any difference whether they won or not, we wouldn't get back home, anyhow. He said that after Japan had won the war he was coming back to the United States and be a big shot because he could speak the English language." [Rep. Tr. p. 2046, line 16, to p. 2047, line 5.]

And early in December 1944 in the rest hut at the mine:

"Q. State what was said by the defendant and anyone else then and there present at that time.

Mr. Lavine: Objected to as irrelevant, incompetent and immaterial.

Mr. Carter: Offered for the purpose of showing the intent and state of mind of the defendant.

The Court: Objection overruled. It will be received for that limited purpose. You may answer.

A. Kawakita told us lazy yanks to get out there and get our cars rolling.

The Court: What did he say?

Q. By Mr. Carter: Use his words as nearly as you can, Mr. Shaffer.

A. 'You lazy Yanks, get out there and get your ore cars rolling.' "

Witness Alfred A. Hale.

In May or June, 1945, in the kitchen in the camp:

"Mr. Carter: This is offered on the subject of intent and the state of mind of the defendant.

Mr. Lavine: I still object to it, your Honor, as irrelevant, incompetent, immaterial, and not within the issues of the case.

The Court: Very well. The objection is overruled. The testimony will be received for the limited purpose as it bears on the issue of intent or state of mind.

Q. By Mr. Carter: What did you hear and see at that time and place, Corporal? A. I walked up to the kitchen door. I was standing just outside the kitchen door and I heard Kawakita say, 'Well, it don't make a damn to me which way the war goes because I am going back to the States anyway.' " [Rep. Tr. p. 2159, line 19, to p. 2160, line 7.]

Witness Irvin L. Abbott.

In December 1944 at the messhall at the mine in the presence of the mine detail of around 200:

"Q. State what you heard the defendant say, if anything, and what happened at that time and place?

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, not within the issues of this case.

Mr. Carter: Offered for the purpose of showing the state of mind and intent of the defendant.

The Court: Objection is overruled. The evidence will be received for the limited purpose stated.

A. Why, he was in a little room adjacent to the large mess hall where the hanchos, the Japanese interpreters, were eating their lunch. They hadn't started eating at that time. They were smoking and sitting around. Kawakita called out a number, one of the men's number, and told him to bring his box of rice and bring it up there, and he made him turn it over so that he couldn't have it for his noon meal. He said, 'This man reported in sick.'

He says, 'Anybody who is too sick to work is too sick to eat.' " [Rep. Tr. p. 2218, lines 5-21.]

And on the day that work finally ended in the camp; on August 14, 1945, when the factory detail returned to camp:

"Q. What did you see or hear at that time and place? Just a minute. Let us have our objection before the witness starts to answer it. This is only for the purpose of showing intent and state of mind of the defendant.

Mr. Lavine: I object to it as incompetent, irrelevant and immaterial, and not within the issues of this case.

The Court: The objection will be overruled and the evidence will be received for the limited purpose of showing intent or state of mind. You may answer the question.

A. Kawakita spoke up and he said, 'You American bastards will be well fed,' or words to that effect, 'You will be getting fat from now on.' That was it." [Rep. Tr. p. 2221, lines 4-15.]

Witness Hardy M. Wooldridge.

In November or December, 1944, at the mine:

"Q. What did the defendant—pardon me.

This, if the court please, is for the purpose of intent and state of mind, and is not one of the overt acts.

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, and not within the issues of the case.

The Court: The objection is overruled. The evidence will be received for the limited purpose offered, namely, only insofar as it bears upon the issue of intent or state of mind.

Mr. Lillie: Thank you.

Q. Was there a conversation there at that time? A. Yes, there was.

Q. All right. Will you tell the court and jury what the conversation was and who said what? A. Kawakita came up to our hanchō, who was Sgt. Rizo—

Mr. Lavine: May my objection go to the entire incident?

The Court: Yes; and this entire incident is received for the limited purpose offered, namely, as it bears upon the issue of intent and state of mind only.

Q. By Mr. Lillie: Will you continue, Sergeant, please? A. Sgt. Rizo and Kawakita, as he came up, were talking. Kawakita asked him why we couldn't get more ore out. And this was a rocky level and we had to dig rock, had to carry the rock and dump them off the hillside, push the cars back. And he told him that it just taken a lot more time. And he told him he wanted us to hurry up and try to get out more ore, try to get out as much as the No. 2 level which was below us, but they had soft dirt to work in. It was very rocky at the level we were working, and he tried to explain that that was the reason we couldn't get any more ore out than we did.

Q. Who said that? A. Kawakita. Sgt. Rizo told Kawakita.

Q. Stated that to Kawakita? A. Yes, sir.

Q. What was Kawakita's answer in respect to that, if anything? A. He told him that didn't make any difference; we should be able to get out as much ore as they were down below us." [Rep. Tr. p. 2432, line 1, to p. 2433, line 16.]

Also in December of 1944 at the rest shack at the mine:

"Q. And what did the defendant say, if anything, at that time?

Mr. Lavine: The same objection, your Honor, irrelevant, incompetent, immaterial, and not within the issues of this case.

A. He ran us out of there—

The Court: Just a moment.

Mr. Lillie: It is for the limited purpose of intent and state of mind, your Honor.

The Court: The objection is overruled. The evidence is received for the limited purpose stated, to enable the jury to determine the issue as to state of mind or intent with which the defendant acted, if the jury should find from the direct testimony of two witnesses to the same overt act that the defendant did one or more of the alleged overt acts charged in the indictment.

Q. By Mr. Lillie: Just tell me what the defendant said, if he said anything, Sergeant. A. He told us, asked Sgt. Rizo how long we had been in the shack. He told him he didn't know. We hadn't been there long. He told us to go back to work. And he said, 'Well, we haven't had our full break period.' He told him that didn't make any difference; go back to work, and which we did.

Q. Who do you mean by 'he'? A. Kawakita." [Rep. Tr. p. 2436, line 8, to p. 2437, line 8.]

Witness William L. Bruce.

In November 1944, when witness was being examined for identification:

"Q. What happened at that time and place, and what was said, if anything, by anybody present?

Mr. Carter: This is offered for the purpose of proving intent and state of mind of the defendant.

Mr. Lavine: To which we object as incompetent, irrelevant and immaterial, and not within the issues of the case.

The Court: The objection will be overruled and the evidence will be received for the limited purpose offered—that is to say, for the purpose of showing intent or state of mind with which the defendant acted, if you find from all the evidence upon the close of the case that the defendant did act as charged in the indictment.

* * * * *

A. The defendant asked me what my name was and I stated it, and he asked me my organization and where I had been taken a prisoner and told me to pull off my shirt, that he was looking for identification marks.

Well, being tattooed on the upper and lower right arm I immediately rolled up my sleeves and I said, "Tattooes on right forearm," and he reached over and pulled them like this, and pinched them, and told me to take off 'my damned shirt'; that he was looking for identification marks, and I immediately pulled my shirt off." [Rep. Tr. p. 2755, line 24, to p. 2757, line 11.]

In November 1944, at the mine, when Smiling Sam gave the POWs some roasted nuts:

"Mr. Carter: If the court please, this is again offered on the matter of the state of mind or the intent of the defendant.

Mr. Lavine: To which I object as incompetent, irrelevant and immaterial, and not within the issues of the case.

The Court: The objection will be overruled and the evidence will be received for the limited purpose offered. You may answer the question.

A. It was getting pretty cold in the latter part of November and I believe it had started, maybe, perhaps, to sleet or snow, and the Japanese were carrying their winter supply of wood out to the mountains where we were work-

ing, and one of the Japanese stopped in and was talking to our hanchō, this Smiling Sam, and he had a bag of acorns or hickory nuts or whatever they were. They were nuts.

* * * * *

Then did you get some of the nuts? A. Yes.

Q. What did you do with them? A. My ore car—the rest period was over—shortly after the rest period was over, shortly after these nuts were given to me, we took our ore car on down to the hoppers, which was about three-quarters of a mile, and dumped it into the hoppers, and on the way back up I believe it was Evans or Blanket would push. I pushed while he ate his nuts, and he would hold his head against the back of this ore car like he was pushing, too. Well, we got about half way up there and he says, ‘All right, I will push and you eat your nuts.’

Q. Then what happened? A. I just started to eating them and the defendant here hollered, ‘What in the hell have you got there?’

* * * * *

Q. All right, what else was said if anything at that time and place? A. And I showed Kawakita what I had in my hands and he slapped them out of my hands and told me I would be sorry for going into the woods and getting nuts when I should have been working. I tried to explain to him that they were given to me by this hanchō and he immediately turned around and walked off. He wouldn’t listen to what I had to say.” [Rep. Tr. p. 2758, line 23, to p. 2761, line 5.]

In April or May of 1945, while on the night shift at the smelter :

“Mr. Carter: This is again offered for the purpose of showing intent and state of mind of the defendant.

Mr. Lavine: To which we object as irrelevant, incompetent and immaterial.

The Court: The objection is overruled; the evidence will be received for the limited purpose stated.

* * * * *

A. We were working in the finished ore shed where the ore, after it had been finished, was stored in this room to be put on railroad cars. And about 8:00 o'clock or a quarter to 8:00 in the morning the Japanese hanchō in charge, which I knew as 'The Old Man' or 'Jo-To Hanchō' and various other names, told us to wade out of this water and take a break, take a smoke.

Q. By Mr. Carter: Did you have any cigarettes?
A. No.

Q. On your person at that time? A. No; I didn't have a cigarette.

Q. Well, did you get a cigarette on that occasion?
A. Yes; I did.

Q. From who? A. This 'Jo-To Hanchō.' We told him we couldn't take a smoke because we didn't have any cigarettes; so he took a Japanese cigarette and he broke it in two and he handed half of it to me and half of it to one of the fellows that was working there.

Q. What did you do? A. And I stayed there a few minutes and didn't have a match and he told me, 'You don't have anything.' And I told him, 'No.' And he walked over and lit my cigarette and I leaned back on my shovel, a shorthanded shovel, and I had just started to put it to my face about the second time when I heard something running, and just as I turned around the defendant hit me in the mouth and knocked this cigarette and the fire all over my face, and told me that all I was supposed to do was work for the Japanese people. But I tried to explain that this hanchō had given me the cigarette and he immediately turned around and walked off, laughing." [Rep. Tr. p. 2764, line 24, to p. 2767, line 5.]

S.

Dr. LeMoyne Bleich, senior American officer in the camp, testified as follows [Rep. Tr. pp. 3406-3410]:

A. By Mr. Lavine: Now, Doctor, in respect to Philip D. Toland, you have notations here as to his professional visits to you. Does this card truly reflect the various professional visits that Philip D. Toland made to you as a doctor during that period of time as indicated by the card? A. Yes.

Q. Now, you have various notations made in connection with the card and particularly in connection with the last column of the card. Will you explain those notations, Doctor? A. Yes. In the last column of the card there appear the letters W or R. Sometimes it is RS and sometimes H. It is usually W or R which stand for work and R stands for rest—being kept within the camp, whether on a hospital status or just a rest status, there being very little physical distinction between hospital or plain rest. So if I saw a man and made some complaint and I was able to give him either some advice or some medication and yet still felt, by the standards we were then using, he was still capable of going to work, I marked him W. However, if I felt he should not go to work I marked him R and then the Japanese were asked if we couldn't keep him in until he became ready to go to work again. That is what this last column would indicate, whether the man was at work or whether he was within camp at rest.

Q. Now, commencing with August, 1944, you examined him and made some notations and then you marked him down for light duty, didn't you? A. That is right.

Q. Instead of work or rest? A. That is right.

* * * * *

Q. Now, you have a notation as to where you thought he could work and what does that notation show? A. I requested that he be put on light duty at the factory and he stayed in that status until the 8th of December and he again went on rest and was on rest from the 8th to the 21st at which time he went on a light duty detail which we called the "benjo party." It was a group of men whose duty it was to dip the latrines and carry the refuse out to the garden. That was considered light duty.

Q. And that was inside the camp, was it not? A. It was within the camp and in the gardens around the camp compound.

Q. And how long did that continue? A. Apparently he stayed on that until the 26th of January when again it was necessary to rest him. He stayed on rest then until the 15th of April. He worked then until the 18th of April. He rested until the 21st and then again went to work. Do you want this continued?

Q. Yes, please. A. He worked from the 21st of April to the 15th of August. At that time he went—that was a light duty job he was on, what we called the garden party, men working around the truck gardens adjoining the camp. Of course the 15th of August was V-J Day and after that I have no specific notation as to whether he was in a work status or rest.*

*This is the period which Toland and other government witnesses placed him lifting ore rock, an entirely different job at the factory.

Q. All right; thank you. Doctor, referring now to Defendant's Exhibit BH in evidence, I will ask you to decipher for us the card that you have made of J. C. Grant. Now, just—

Mr. Carter: BH?

Mr. Lavine: Yes, BH in evidence.

Q. When did he first see you and how frequently did he see you? A. My first note here is in September. I examined him previously in August. It was not until early September that I got these cards so we start in September. On the 11th of September Grant was on rest and stayed on rest until the 13th of September; then he worked to the 12th of January; then he rested from the 12th of January to the 2nd of February; then he worked from February 2nd to March 28th; rested from March 28th to May 15th; worked from the 15th of May to the 29th of July, and subsequent to that he was considered on rest. [Rep. Tr. pp. 3406-3410.]

Excerpts from testimony of Dr. LeMoyne Bleich, American medical captain in the camp. His records show no complaint against Kawakita. His testimony is corroborative of defense witnesses that Kawakita took prisoners to the dentist, asked for extra vitamins from the company for Americans, and his request was complied with:

Q. Would you just tell us what occurred with reference to giving the men dental treatment and what you did with respect to it? A. Yes. Apparently before we had come to the camp it had been possible for the British-Canadian group, upon occasion, to take some men who needed dental treatment badly to a local civilian dentist, Japanese, whose offices were within easy walking distance

of the camp, perhaps a mile or two. And when we first got there, there was no attempt made to have any dental treatment done. But the matter was again brought up by Major Beadnell, who asked Sgt. Harvey to see if the Japanese would again allow us to take men to the Japanese dentist for treatment. And Sgt. Harvey made representations to the Japanese, and subsequently we were allowed to take limited number of men who were in very, very dire need of dental treatment to this local Japanese dentist, and he was paid by the prisoners.

Q. In what manner was he paid by the prisoners?

A. He would make an estimate of the amount of work he had to do and, upon completion of the work, he was paid in yen which we as prisoners had received as pay. In fact on one occasion a letter was written to the Japanese requesting that myself, Major Beadnell, Lt. Bryant, and one of the Canadian lads who was custodian of the funds be allowed to draw a sum of money from the Japanese bank or postal savings where some of the pay which they had given us was on deposit. And after this letter had been received, it was acted on in a matter of several weeks or a month, and we received, I believe, one or two thousand yen of our money so that we could pay this Japanese dentist.

Q. Did you have occasion to receive vitamins or extra medical supplies at any time while you were in the camp?

A. There were, originally, the Japanese supplied a vitamin B powder. I believe it probably was a dried yeast which was issued to us, and those we used. There were also some Red Cross Vitamins available which we used, also, what I believe to have been some rice polishes which were available to us.

The Court: When you say "Red Cross" what Red Cross?

The Witness: Our Red Cross, the American Red Cross multi-vitamins. We got some of those. I have forgotten exactly the date, but they were available to us in small amounts.

Q. By Mr. Lavine: Did some of these supplies come from the company? A. I understand that some of the medication was supplied by the company.

The Court: By the "company" what do you mean?

The Witness: I mean the company which operated the mine and the factory where the men worked.

Q. By Mr. Lavine: That is the Nippon Yakin Metallurgical Company? A. I don't know what its name is.

Q. Doctor, you spoke this morning about not having been to any hospital in the mine. Was there some medical hospital attached to the ore mine? A. I was told there was.

Q. Sort of an emergency hospital? A. I understand that is what it was.

Q. And Doctor, in connection with the food situation was that getting gradually scarcer and scarcer as the time went on in your confinement in Japan? A. Yes.

Q. And did you receive rumors or reports regarding the progress of the war or the defeat of the enemy while you were in camp? A. Rumors were always present and we think we had some information.

Q. As a matter of fact you made some diary entries about Germany being defeated and you hoped the war would be at an end soon, didn't you? A. Yes.

Q. In substance? A. Yes.

Q. Doctor, were there rules and regulations forbidding the men—strike that and withdraw that question. Was there a situation with reference to food which made it important for you and the other officers in the camp to prevent any stealing of food from one and another or from any other source because of the shortage of food? A. Yes.

Q. And what was the reason for that? A. Well, there were several reasons. First of all the amount of food was barely adequate to maintain the men even though they had their full share, so any stealing would jeopardize the entire group. Secondly, we were aware of the shortage of food generally and the Japanese forbid stealing. Particularly did they admonish against stealing from the gardens and that I not only agreed with because the gardens were being fertilized with human excreta. It would have been foolhardy for the men to have stolen any garden produce and eaten it without duly cooking it which, of course, they couldn't do it unless it came through the regular channels.

Q. And did you yourself issue orders against stealing food from the garden? A. Yes.

Q. Now, Doctor, on November 3rd you made a reference with reference to that matter. In your diary of November 3rd, 1944, Friday:

“This A. M. Four Britishers caught stealing sweet potatoes and were beaten at order of Nipponese. They deserved it though for such action redounds to the disfavor of all.”

Was that a recordation that you made at that time? A. Yes, that is quite correct.

Q. And Doctor, this morning I asked you something about Major Beadnell as referred to in your diary and you wrote at that time:

“Major Beadnell gave me some much needed advice last Saturday. He believes I am too familiar with the troops. Perhaps I am. At any rate we have had Lt. Bryant placed in command and I am just the doctor. That is what I want. I believe it is good to have Bryant in charge. He is a line officer and should be. Besides it relieves him from going out to labor.

“I do hope what I have done is for the good of men. Frankly I believe all I have done has been A. M. D. G.”

Q. Would you interpret that? A. “To the greater honor and glory of God.”

Q. “Although it may have caused me to lose some social respect. To become the aloof officer seems foreign to me. We are all in this together and it is none too pleasant at best. I feel hypocritical. Then too I have gotten nowhere with the Nipponese. I had hoped to do so much yet getting anything from them is like opposing a stone wal.”

Then in reference to Major Beadnell you said a little later:

“I have the impression that Major Beadnell is not playing fair. I know he is keeping in men more fit than some I am sending out. He is also using our pitifully small store of sulfaquanadine and I am not. Maybe he really needs to but I doubt it. Yet I cannot accuse him. I have no proof. I want to play the game squarely yet how can I if I am not sure. I wish our two doctors were more intimate then we could arrive at some set policy. I wish we were all British or all Americans in this camp.”
[Rep. Tr. Vol. XXIII, p. 3399, line 4, to p. 3405, line 13.]

T.

On questions of intent Kawakita testified [R. 4143]:

“Q. Did you ever tell anybody in the camp that you were an American citizen born in Calexico? A. Never did.

Q. Did you ever tell anybody in the mine or the factory that you were an American citizen born in Calexico? A. No, sir. [R. 4143.]

* * * * *

Q. Did you have anything to do in recording their record or entries of where they came from or who they were or in making a list of their entries? A. No, sir.

Q. Did you ever have any discussion with Bruce about nuts or acorns? A. No, sir.

Q. Did you strike Bruce or knock out of his hand some nuts or acorns, or from his mouth or any part of his body? A. No, sir.

Q. Did you tell him he had no right to go into the woods and get nuts when he should have been working? A. No, sir.

Q. Did you have any authority to tell him anything like that? A. No, sir.

Q. And did you tell Bruce that he had no right to smoke a cigarette? A. No, sir.

Q. Did you strike a cigarette out of his mouth? A. No, sir.

Q. If you had done so after a Japanese military official or foreman had given him a cigarette would you have been subject to military punishment? A. Yes, sir.

Q. And what punishment would you have been subject to? A. Be severely punished.

Q. Did you at any time tell Bruce or any prisoner of war any of the things that I have read to you or asked you here, whether you knew them by the name I have designated them or in any manner, shape or form? A. Never did.

Q. In other words, if the prisoner of war was not known to you by the name which we have called them here, but by some number or there was some other prisoner of war; would your answers be the same as you have given them to me heretofore? A. Yes, sir.

Q. Mr. Kawakita, how did the end of the war get announced at Oeyama? A. On August 15th, at about 11:30 in the morning, there was a special announcement that the Emperor will make a broadcast on or about 11:30 that morning. So, I was working at the warehouse office and I noticed on the ground where the employees assembled, they were putting out a couple of loud speakers connected to radios. So, everybody assembled so they could hear what the Emperor said.

Q. And then what happened? A. After the Emperor spoke to the radio there was a common analysis of his broadcast so that everyone could understand it as a news commentator.

Q. And after the broadcast did you continue working? A. I stayed at the company until that evening when I went home—when I went back to the dormitory.

Q. And after you went back to the dormitory where did you report the next day or the day after that? A. The next day when I went to the camp, the camp authorities told me to come to the camp and help Mr. Fujisawa, to help the American prisoners of war which was going to be handed—to help the American prisoners of war after they would take over the camp.

Q. And who took over the camp? A. The officer?

Q. Yes. A. It was Major Martin who took over the camp.

Q. And what other officers took over the camp under him? A. I remember a lieutenant named Thompson, who was a provost marshal and there was a captain by the name of Olson.

Q. Then after they took over the camp did you get instructions from them? A. Yes.

Q. What did you do after that? A. I went to Major Martin to report and he said that he (*sic* I) had to take orders and interpret the orders to the Japanese people which the officers and Mr. Martin will say to do.

Q. And what did you do from that time on? Just tell us what you did; did you report to the camp every day? A. I reported to camp every morning about 7:10 in the morning and stayed there until sometimes 9:00 o'clock, 10:00 o'clock that evening.

Q. And what work did Major Martin or the other American officers have you to do? A. I went with Major Martin to the factory office, which was the Oeyama branch office located at the factory, and I interpreted for Major Martin, at his request, of something having a telephone installed within the camp grounds.

Q. And then after that what did you do? A. Then after, when the B-29s started dropping medical supplies, food, clothing around the area, I went with two or three officers to make sure that the natives, these Japanese civilians in that area, would not steal them. And I interpreted for the company to get the trucks ready to bring the supplies that were dropped from airplanes to the camp.

Q. You say two or three officers; what kind of officers were they? Were they American officers? A. American officers.

Q. Just where did you go to pick up these supplies? A. On one occasion we received the—the camp received a phone from the Port of Miazuru which was a Japanese naval port on the side of the Japan Sea, and it was reported that the B-29s had dropped on two different places near the City of Maizuru. Next morning, I think it was Capt. Olson and I and another officer, went on the train, rode on the train about an hour to the city of Maizuru and reported to the Japanese military office which was still functioning there, and from the military officer—I think he was lieutenant or captain—told us that the airplane, the B-29 dropped some food or some supplies on the Japanese civilian homes, and also at the Japanese naval prison which was located in the mountains about three or four miles from the outskirts of Maizuru.

First, we went to the Japanese—to the civilian home where they dropped, and the American officers surveyed the damage, and then in expressing their regret as to what happened because the supplies fell on the house and made a big hole. And I still remember there was a couple of childrens about eight or nine years old being injured. And I interpreted for the American officers, expressing their regret that things happened like that. And I still remember that the American officer left some chocolates and a carton of cigarettes, I think or something like that to the family over there, and I interpreted what they said to the Japanese family. Then we went to the naval base—

Q. When you say “we,” was Capt. Olson an American captain? A. Yes, sir.

Q. A captain in the American army? A. Yes, sir.

Q. When you say "we went" who was we? A. There was Capt. Olson and a couple of officers and I.

Q. A couple of American officers? A. Yes; a couple of American officers and I.

Q. All right. Where did you go? A. After we went to that home we went to the Japanese naval prison and reported to the prison administrator, and he guided us to the hills which was about on the other side of the cell block, outside the walls on the hills, to see where the supplies had dropped. But early that morning the Japanese inmates in the prison had already brought some of it down to the administration building. We saw them bringing the rest of it down.

Q. What else did you do during the period of time? A. I remember on one occasion I went with Major Martin and Lt. Thompson to the police station at Miazui, which is about four or five miles from the camp and the factory. I went at the Miazui police station. Major Martin requested to the Japanese chief of police at that station for prophylactic station, and Major Martin asked him to use one of the rooms on the second floor and one room for a provost marshal's office, and the Japanese police, chief of police, said that he will give certain rooms to him so that the prisoners of war could use as a prophylactics station and office for the provost marshal.

Q. Then after that occasion did you go down with some officers again down there? A. Yes, sir; we went. I went with a couple of American officers. There was a group of American officers—I don't know their names—and they wanted to go to a Japanese hotel. So they wanted me to interpret for them, and one of the resort hotels in the town of Miazui which was located on the shore, and

we managed to get, to rent a big room and we had a lunch at that place at the hotel.

Q. And about how many American officers were there at that time? A. There were about eight to fifteen officers at that time when we went to the hotel.

Q. Then did you on subsequent occasions render other services to the Americans after they took over Camp Oeyama? A. Yes, sir.

Q. What else did you do? A. There were excursion trips to one of the Amanohashidate, which is one of the three sceneries of Japan. It was located on the bay of Miazui. And we went on the barge from the place near the camp. The Miazui dock facilities furnished the barge and the tug boat, and we went on there to the Amanohashidate. We climbed the mountain or hill, which was not so high, and the Nariai-Zan it is called in Japanese. You could see the Amanohashidate and the Miazui Bay.

Q. After that did you render other services to the American officers and personnel who had taken over the Camp Oeyama? A. Yes, sir.

Q. What other things had you done? A. When the prisoners of war were ready to leave. There were some notification to the Major that they wanted the prisoners of war to leave a certain date, and Major Martin and I went to Iwataki-Guchi station, which is the station where the prisoners of war entrained. And it was the day before that Major Martin and I went to see the station master to arrange the train, so many cars, so many coaches, so many baggage cars for the freight to be taken to the destination. And I think Major Martin told him—I interpreted what Major Martin said and the content. He said that he needed two different groups because there

was 600 men in the camp, and the Japanese station master said that that was right, because there is only—on passenger trains the length is limited, the length of the coaches, how many coaches are attached to an engine, so it is best to have two different trips, two different groups leave there.

Q. And on the day that they left did you assist the men in getting off on September 9, 1945? A. Yes. Major Martin ordered me that morning to get two trucks and get the supplies, surplus supplies which the prisoners of war did not use during their stay from the 15th of August to the day they left. So we loaded all the things that the prisoners of war wanted to take and the supplies, and took them to the station and the train was ready about one hour before they left and we loaded everything on. The Japanese that were working on the truck, and there was a couple of American prisoners of war helping load the freight on the train so they could leave together with the coach and the freight cars. It was the baggage car they loaded in.

Q. Did you see them leave finally? A. Yes, sir. It was about 10:30 in the morning when they left the Iwataki-Guchi station, and I told the boys, we all greeted them farewell, and some of the boys told me they would like to see me. We said this might be a small world so they might see us, and there was a lot of noise at the station.

Q. At any time prior to the time they left did anybody ever question you or ask you or interrogate you as to whether you had committed any act of treason? A. No, sir.

Q. Did any officer of the American occupying forces seize you or question you in any manner, shape or form

as to whether you had committed any act of treason? A. No, sir.

Q. Did you afterwards go to work somewhere else in Japan? A. Yes.

Q. And where did you go to work? A. I went to work in November with the Wakasa Kogyo Kabushiki Kaisha.

On the question of intent, Kawakita said:

Q. In the late spring or early summer of 1945, within the confines of Camp Oeyama did you participate in or assist the military personnel of the camp in directing and executing any punishment upon Woodrow T. Shaffer? A. No, sir.

Q. Did you at any time tell Woodrow T. Shaffer that he should kneel or be placed upon a platform or be otherwise punished? A. I did not have any authority to say so.

Q. Well, did you say that? A. No, sir.

Q. Were you present when such a thing occurred? A. No, sir.

Q. Where were you working during the late spring or early summer of 1945? A. I was working at the warehouse office as a clerk.

Q. In October of 1944 did you at any time order and command Nathan Sutton, who is also known as Nathan Solomon, and Frank Mino, to replace a loaded ore car on the rails? A. No, sir.

Q. Where were you working in October of 1944? A. I was working at the mine at that time.

Q. Did you at any time order these men to replace any loaded cars? A. No, sir.

Q. Did you have any authority to give any such orders? A. No, sir.

Q. Did you strike and beat Nathan Sutton and Frank Mino? A. No, sir.

Q. Did you at any time while you were working in Oeyama ever have any intent to betray the United States? A. No, sir.

Q. Did you at any time while you were working in Oeyama have any intent to give aid and comfort to the Japanese government? A. No, sir.

Q. Did you at any time while you were working in Oeyama do this work with any intent to help the United States lose the war and help Japan win the war? A. No, sir.

Q. Did you at any time do anything there to compel any members of the American armed forces to become abjectly subservient? A. No, sir.

Q. Did you at any time do anything to attempt to destroy the morale and the physical and mental well-being of the members of the armed forces of the United States? A. No, sir.

Q. When you came to Oeyama after your return from China did you at any time do any work in classifying or helping to classify any of the prisoners of war by identification? A. No, sir.

Q. As far as you knew, were the prisoners already all classified and entered? A. So far as I know, I think they were.

* * * * *

Q. And just explain whatever you want to explain to us. How did it happen? A. The Japanese Foreman told

me to interpret, to interpret to Sgt. Montgomery that he used vulgar language in Japanese, which was very hard to explain in English and I didn't want to explain it the same, the exact way the foreman said in Japanese.

Q. Then did you use language comparable or did you use milder language in interpreting? A. It was much milder language which I interpreted.

Q. Did you ever say any of these things on your own initiative? A. No, sir.

Q. The Sergeant also said that you said: "Come on. Get to work. Come on. Snap out of it and hurry up." Did you say words somewhat like that or words to that substance and effect? A. I interpreted what the Japanese foreman told me to interpret to the men.

Q. Did you ever say those things on your own initiative? A. No, sir.

Q. Did you ever have a conversation with Sgt. Carrier in which you said in substances and effect—in which you discussed General MacArthur? A. No, sir. There was orders at the camp not to talk anything about the war, politics or anything, or about ourselves.

Q. Did you ever say to Carrier in substance and effect that General MacArthur was—that you thought it was dirty of General MacArthur to leave us like that. He wasn't no good. Did you ever say anything like that to Carrier? A. No, sir.

Q. Or to any prisoner of war? A. No, sir.

Q. Did you ever say to a prisoner of war named Ennis—did you ever discuss with him the new factory building that was being built on the ground? A. No, sir.

Continuing on from this point [page 4118 of the record to 4148] Mr. Kawakita categorically and specifically denied each and all of the conversations contributed to him, in part as follows:

Q. Did you say to him in substance or effect when he asked you if this was another nickel factory, did you say to him, "It is going to be a dime factory"? A. No, sir.

Q. Did you have any discussions with him about where he was from or where you were from? A. No, sir. There was orders not to talk about ourselves posted. It was told by Lieutenant Hazama.

Kawakita explained that it would have been a violation of orders to have had these discussions and that he might be severely punished or killed if he did so. [R. 4130.]

From here to the conclusion of his testimony he denied testimony offered by the government to show intent. [R. 4130-4148.]